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No. 84-861-CFX
Status: GRANTED

Title: National Labor Relations Board, Petitioner
v.
International Longshoremen's Association, AFL-CIO, et al.

Docketed:
November 28, 1984

Court: United States Court of Appeals for the Fourth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Auten, William L., Lips, J. Alan, Gleason, Thomas W., deMember, Raymond P., Scanlan, Francis A., Lambos, Constantine P., Towle, William H., Wilder Jr., Roland P.

Entry	Date	Note	Proceedings and Orders
1	Oct 17 1984		Application for extension of time to file petition and order granting same until November 28, 1984 (Chief Justice, October 19, 1984).
2	Nov 28 1984	G	Petition for writ of certiorari filed.
3	Dec 28 1984		Brief of respondents Intl. Longshoremen's Assn., et al. in opposition filed. VIDED.
4	Jan 2 1985		DISTRIBUTED. January 18, 1985
5	Jan 21 1985		Petition GRANTED. Justice Powell OUT.
			**
6	Feb 11 1985	G	Motion of respondents New York Shipping Association, Inc., et al. for divided argument filed.
7	Feb 14 1985	G	Motion of the Solicitor General for divided argument filed.
8	Feb 25 1985		Motion of respondents New York Shipping Association, Inc., et al. for divided argument GRANTED. Justice Powell OUT.
9	Feb 25 1985		Motion of the Solicitor General for divided argument GRANTED. Justice Powell OUT.
10	Feb 28 1985		Brief of respondent American Warehousemen's Assn. filed.
11	Mar 1 1985		Brief of respondents Am. Trucking Assn., et al. filed.
12	Mar 1 1985		Brief of respondent Internatl. Brotherhood of Teamsters, etc. filed.
13	Mar 4 1985		Brief of respondent Houff Transfer, Inc. filed.
14	Mar 1 1985	G	Motion of Delta Steamship Lines, Inc. for leave to file a brief as amicus curiae filed.
15	Mar 1 1985	G	Motion of Chamber of Commerce of the United States of America for leave to file a brief as amicus curiae filed.
16	Mar 6 1985		Joint appendix filed.
17	Mar 8 1985		Brief of petitioner NLRB filed.
18	Mar 13 1985		Record filed.
19	Mar 13 1985		Certified original record & C.A. proceedings, 47 volumes, received. (Boxes).
20	Mar 14 1985		Opposition of respondent to motion of Delta Steamship Lines, Inc. for leave to file a brief as amicus curiae filed.
21	Mar 18 1985		Motion of Delta Steamship Lines, Inc. for leave to file a brief as amicus curiae GRANTED. Justice Powell OUT.
22	Mar 18 1985		Motion of Chamber of Commerce of the United States of

Entry	Date	Note	Proceedings and Orders
			America for leave to file a brief as amicus curiae GRANTED. Justice Powell OUT.
23	Mar 25 1985		SET FOR ARGUMENT, Tuesday, April 23. (1st case)
24	Apr 1 1985		Brief of respondents Intl. Longshoremen's Assn., et al. filed.
25	Apr 1 1985	G	Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae filed.
26	Apr 1 1985		CIRCULATED.
27	Apr 15 1985		Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae GRANTED.
28	Apr 15 1985	X	Reply brief of respondents American Trucking Association, et al. filed.
29	Apr 16 1985	X	Reply brief of petitioner NLRB filed.
31	Apr 23 1985		ARGUED.

84-861 (1)

No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the National Labor Relations Board correctly concluded that the collectively bargained rules governing the use of containers in the shipping industry, in their application to certain widespread practices of motor carriers and warehouses, lack a valid work preservation objective and therefore constitute unlawful secondary activity under Sections 8(b)(4)(B) and 8(e) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(B) and 158(e).

PARTIES TO THE PROCEEDING

The decision of the court of appeals was issued in four consolidated cases seeking review or enforcement of decisions of the National Labor Relations Board. The International Longshoremen's Association, AFL-CIO (ILA) appeared as petitioner in one of those cases, intervenor in another, and respondent in the other two; also appearing as petitioner, intervenor, and respondent was the Council of North Atlantic Shipping Associations. Additional respondents were the ILA Hampton Roads District Council; the ILA Atlantic Coast District Council; the ILA District Council, Baltimore, Maryland; ILA Locals 333, 846, 862, 921, 953, 970, 1248, 1355, 1416, 1416-A, 1429, 1458, 1526, 1526-A, 1624, 1680, 1736, 1783, 1784, 1819, 1840, 1922, and 1970, AFL-CIO; the Hampton Roads Shipping Association; Southeast Florida Employers Port Association; Coordinated Caribbean Transport, Inc.; Chester, Blackburn & Roder, Inc.; Eagle, Inc.; Eller & Company, Inc.; Harrington & Company, Inc.; Strachen Shipping Company; and Marine Terminals, Inc. American Trucking Association, Inc., Tidewater Motor Truck Association, and the New York Shipping Association appeared as petitioners and intervenors below. The International Association of NVOCCs, Florida Custom Brokers and Forwarders Association, Inc., Twin Express, Inc., and International Container Express, Inc., were petitioners below. Houff Transfer, Inc.; the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America; the American Warehousemen's Association; and San Juan Freight Forwarders, Inc., were intervenors below. Under Rule 19.6 of the Rules of this Court, all of these parties are respondents in this Court.

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TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1984

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a)[1] is reported at 734 F.2d 966. The decision and order of the National Labor Relations Board (Pet. App. 35a-64a) and the decision of the administrative law judge (Pet. App. 65a-258a) are reported at 266 N.L.R.B. 230.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1984. A petition for rehearing was denied

[1] "Pet. App." refers to the appendix filed jointly by the petitioners in Nos. 84-677, 84-684, 84-691, and 84-696. "C.A. App." refers to the joint appendix filed in the court of appeals.

on July 31, 1984 (Pet. App. 31a-34a). On October 19, 1984, the Chief Justice extended the time in which to file a petition for a writ of certiorari to November 28, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(b) of the National Labor Relations Act, 29 U.S.C. 158(b), provides in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any service; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> * * * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title:

> *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing * * *.

Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), provides in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void * * *.

STATEMENT

This case concerns the Rules on Containers, which are part of collective bargaining agreements between the International Longshoremen's Association (ILA) and shipping industry employers. The Rules on Containers were adopted in response to a technological innovation in the shipping industry and are designed to deal with the impact of containerization on longshoremen's work. In *NLRB* v. *ILA* (*ILA I*), 447 U.S. 490 (1980), this Court vacated two decisions of the National Labor Relations Board that had concluded that the Rules on Containers and their enforcement constitute secondary activity prohibited by Sections 8(b)(4) and 8(e) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(b)(4) and (e). On remand, the Board consolidated those two proceedings with seven other proceedings concerning the Rules on

Containers. The Board concluded that the Rules violate the NLRA in their applications to a widespread practice known as shortstopping and to traditional warehousing practices. The Board also concluded that the Rules are otherwise lawful. The court of appeals, disagreeing with the Board in part, held that the Rules are lawful in all respects.

A. The Factual Background

1. *Containerization and the Shrinkage of Longshore Work*

Containerization is a technological innovation that permits individual pieces of cargo to be packed into a large, reusable metal container that can be moved on and off an ocean vessel unopened. Containers range in length from 20 to 40 feet and are capable of holding upwards of 30,000 pounds of freight. They can be fixed to a truck chassis and transported unopened to and from the ocean pier, and they fit into the holds of specially designed vessels known as containerships. Pet. App. 45a; *ILA I*, 447 U.S. at 494. The loading of containers, by whomever performed, is known in the industry as "stuffing"; the unloading of containers is known as "stripping." *ILA I*, 447 U.S. at 497. Containers that contain export cargo belonging to more than one shipper or import cargo destined for more than one consignee are known as LCL (less-than-container load) or LTL (less-than-trailer load) cargo. Containers that contain export cargo from only one shipper or import cargo destined for only one consignee are known as FSL (full shipper's load) containers. *Id.* at 496-497.

Before containerization, longshoremen employed by steamship companies performed the work of loading and unloading cargo on the piers. In the Atlantic and Gulf ports concerned in this case, longshoremen are

represented by the International Longshoremen's Association (ILA). The longshoremen handled export cargo by moving it from the tailgate of the delivery truck at the pier into the hold of the vessel, using forklifts and slings or hooks; they performed this work in reverse in the unloading of import cargo. The process included intermediate steps such as storage, sorting, checking, placing cargo on pallets, cargo repair, and carpentry. Pet. App. 4a-5a, 46a; C.A. App. 562-564, 630-631, 1168-1172, 1306-1307, 1336-1337, 1402-1404, 1442-1445, 1686-1688; *ILA I*, 447 U.S. at 495.

The growth of containerization [2] greatly reduced the traditional loading and unloading work performed by longshoremen. Containers eliminated the need for piece-by-piece (or "break-bulk") cargo handling at the pier. *ILA I*, 447 U.S. at 495-496; Pet. App. 46a. Export containers were stuffed before they reached the pier; import containers were stripped after they left the pier. With respect to containerized cargo, it remained only for longshoremen to take the containers on and off the vessel. Longshoremen continued to load and unload conventional cargo vessels in the traditional manner, to stuff containers for cargo that arrived at the pier piecemeal, and to strip containers for cargo scheduled to be picked up at the pier directly. Pet. App. 46a-47a; C.A. App. 566-567, 602, 635-636, 640-642, 677.

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[2] The first containership appeared in 1957, and the use of such ships, growing gradually at first, dramatically increased in the late 1960s and early 1970s (Pet. App. 5a-9a, 96a, 98a-100a & n.26; C.A. App. 634-635, 1457, 1486-1487; *ILA I*, 447 U.S. at 497 n.11).

2. *Cargo Handling by Motor Carriers, Employees at Inland Warehouses, and Freight Consolidators, Before and After Containerization*

Shipping companies own or lease virtually all containers carried on ocean vessels. They furnish these containers principally to the shippers (or consignees) themselves and to three kinds of firms that serve as agents for the shippers and consignees: motor carriers, warehouses, and freight consolidators.

a. Motor carriers operate between inland points and the motor carrier's terminal in the pier area and also between the terminal and the pier (Pet. App. 46a, 54a, 132a-133a; C.A. App. 256, 318-321, 427). Before containerization, the motor carrier picked up import cargo break-bulk from the pier. Most commonly, the driver returned to the truck terminal in the pier area where the motor carrier's employees unloaded the trailer and then loaded the cargo into different trucks for delivery to the consignees (C.A. App. 320-321, 427). Cargo picked up at the pier from a single shipper for a single nonlocal consignee that filled one truck was brought to the terminal, where it might be reloaded for several reasons—to achieve weight distribution for a long haul run, to meet road safety standards, to allow sequential unloading, or to permit delivery of the cargo to diverse inland locations in accordance with the consignee's directions (Pet. App. 54a; C.A. App. 320-321, 427).

Motor carriers now haul empty and filled containers between the pier and their off-pier terminals, as well as to various other inland locations including warehouses and facilities of shippers and consignees. A carrier that handles import FSL containers—as many do exclusively or predominantly (C.A. App. 253, 460, 500)—picks up a sealed FSL import container from the pier, hitches the container to the

truck, and hauls it to the motor carrier's off-pier terminal (C.A. App. 322, 459-460, 1089-1091, 1116-1118, 1125-1127, 1135-1136, 1144). At the off-pier terminal, the carrier may treat the container in the same way that it previously treated a truckload of break-bulk cargo picked up from the pier and destined for a single consignee—it may either leave the container intact for delivery to the consignee or strip the container and reload the cargo into an over-the-road truck trailer. The practice of stripping FSL loads prior to delivery to a single consignee is known as "shortstopping." Pet. App. 27a, 54a-55a, 133a-134a; C.A. App. 253, 320-321, 459-463, 488-491, 506-507, 1094-1095, 1143.

Trucking companies shortstop containers for a variety of reasons arising from the requirements of surface transportation and at no extra charge to the consignee. Like trailer loads of break-bulk cargo picked up from the pier in the pre-container era, fully loaded containers may exceed state highway weight limitations or be overloaded, unbalanced or otherwise unsuitable for hauling long distances (Pet. App. 55a, 134a; C.A. App. 258-259, 494, 509, 1088, 1094-1095, 1096, 1098-1100, 1111-1112, 1130, 1146-1147). Containers also may be incompatible with conventional truck tractor equipment used for long-distance hauling. It is often more efficient to consolidate the contents of two 20-foot containers into one 45-foot truck trailer. And by using their own trailers instead of containers, trucking companies also avoid maintenance costs and per diem charges on containers. Pet. App. 55a, 134a; C.A. App. 253-254, 258-259, 323, 433-434, 470-471, 493-494, 508-511, 1096, 1098-1099, 1112, 1118-1120, 1130, 1137-1139, 1146-1147.

b. Inland warehouses store cargo for indefinite periods and distribute the cargo according to the

owner's instructions; this enables the owner to meet the shifting or unexpected demands of its customers or the branches of its operation without having the cargo shipped to its central plant unnecessarily. Importers arrange with the warehouse to pick up cargo at the pier. Upon delivery of import cargo to the warehouse, warehouse employees, before containerization, unloaded the truck, sorted, segregated, and palletized the cargo, and placed it in designated storage areas. There it was stored until the consignee instructed the warehouse to distribute or deliver all or a portion of the cargo either to the consignee or to a designated customer or branch outlet of the consignee (Pet. App. 55a-56a; C.A. App. 467-469). In some cases, stored crates or cases of cargo were broken down and individual pieces of merchandise were delivered as directed by the consignee (C.A. App. 466-467).

Since containerization, warehouse employees, instead of stripping truck trailers filled with import cargo, have stripped containers that have been picked up from the pier and delivered unopened to the warehouse. The warehouse employees then frequently perform the same tasks as before containerization—they sort, label, and place the cargo on pallets in order to store it in a designated location to await the owner's instructions on distribution (C.A. App. 431-432, 467, 535-536).

Some warehouses also provide warehousing services for export cargo sent by a single shipper. For example, before containerization, one warehouse stored small lots of cargo for later consolidation and shipment with additional cargo sent by the same shipper (Pet. App. 144a n. 58; C.A. App. 469-470). Another warehouse picked up merchandise from a customer's manufacturer and assembled truckloads of cargo for

each of the customer's overseas branch outlets (Pet. App. 144a n.58; C.A. App. 385-386). Since containerization, warehouses have continued to perform such services, although now they combine designated stored cargo for shipment in FSL containers (Pet. App. 144a n.58; C.A. App. 376, 389-390). In connection with stuffing FSL export containers, warehouses also may perform specialized services for handling and packing cargo (Pet. App. 126a n.46; C.A. App. 500).

c. Freight consolidators combine goods of various shippers in a single shipment at an off-pier terminal and deliver the container enclosing that shipment to the pier (Pet. App. 52a-53a, 124a n.43; *ILA I*, 447 U.S. at 496 n.8). The extensive scale of off-pier stripping and stuffing—particularly the operations of freight consolidators known as non-vessel operating common carriers (NVOCCs)—has been encouraged by a rate structure under which shipping companies charge less for transporting a shipper's cargo when it has been combined with other shippers' cargo in a single container than they charge for transporting that same cargo delivered to the pier in break-bulk fashion to be stuffed into a container at the pier (Pet. App. 127a-129a; C.A. App. 267, 326, 352, 443, 446, 498, 529, 544, 603-604, 865-871, 1316, 1333-1334, 2491-2496). In addition, shippers frequently seek to avoid having cargo handled in break-bulk fashion at the pier because, among other things, there is a greater danger of pilferage and damage (see *ILA I*, 447 U.S. at 494).

3. *The Rules on Containers*

The ILA, representing longshoremen in Atlantic and Gulf ports, and the Council of North Atlantic Shipping Associations (CONASA), an organization of shipping associations whose members are steam-

ship companies and stevedoring companies operating out of North Atlantic ports, have negotiated a series of collective bargaining agreements incorporating provisions known as the Rules on Containers. Those agreements have been treated as master agreements and have been adopted by the ILA and multi-employer associations in every major Atlantic and Gulf port (Pet. App. 47a, 96a-97a & n.23; C.A. App. 1084, 1157, 1189).[3]

The Rules require that, with one exception, all containers (whether LCL or FSL) that would otherwise be stuffed or stripped within 50 miles of the port by employees other than those of the beneficial owner of the cargo must be stuffed or stripped by ILA-represented longshoremen on the pier. The exception is for FSL import container cargo where the cargo is to be warehoused at a bona fide warehouse for a minimum of 30 days. The Rules also state that trucking stations within the 50-mile geographic area used for unloading of containers do not constitute bona fide public warehouses (Pet. App. 103a, 232a-233a).[4]

[3] For the purposes of this case, the Rules in their essentially final form appeared in the 1974-1977 agreement negotiated by ILA and CONASA, as clarified by a restatement pertaining to warehousing of goods issued in 1975 (Pet. App. 87a, 103a-104a, 106a n.29, 222a-234a). The text of the Rules reprinted in the appendix to the Court's opinion in *ILA I* (447 U.S. at 513-522) is the 1974-1977 version as amended by the 1975 clarifying statement, and it it resembles in all significant respects the Rules as incorporated in the parties' agreement negotiated in 1980 (Pet. App. 103a-104a, 237a-238a).

For a discussion of the history of negotiations over the use of containers and of the versions of the Rules included in collective bargaining agreements prior to 1974, see *ILA I*, 447 U.S. at 497-499.

[4] The Rules do not apply to containers loaded or discharged outside the 50-mile geographic area, loaded or discharged at a qualified consignee's facility by its own employees, export containers loaded with cargo of a single manufacturer, containers of personal household goods, mail, and military personnel's personal effects, or containers carrying cargo in the intercoastal trade (Pet. App. 225a-226a).

The Rules forbid the signatory steamship companies from supplying containers to any facility operating in violation of the Rules. The Rules also require steamship companies that fail to comply with the Rules and that release or handle a container that should have been stuffed or stripped on the pier by ILA longshoremen to pay liquidated damages of $1,000 per container into the Container Royalty Fund. Pet. App. 11a, 47a, 103a, 228a-229a.

4. *Applications of the Rules to the Handling of Containerized Cargo in the Cases Consolidated Before the Board in this Proceeding*

In the cases before the Board in this proceeding, the Rules were enforced, beginning in February 1973, with respect to containers released to NVOCCs operating within 50 miles of the Ports of New York, Baltimore, and Hampton Roads; with respect to carriers shortstopping FSL containers at terminals within 50 miles of the ports of Baltimore and Hampton Roads; and with respect to warehouses stuffing and stripping containers within 50 miles of the ports of Philadelphia and Baltimore.[5]

[5] Between 1973 and 1979, the Board's General Counsel issued unfair labor practice complaints alleging that the Rules violated provisions of the National Labor Relations Act and obtained injunctions against their enforcement in several ports. *Balicer* v. *ILA*, 364 F. Supp. 205 (D.N.J.), aff'd without opinion, 491 F.2d 748 (3d Cir. 1973) (New York); *Balicer* v. *ILA*, 86 L.R.R.M. (BNA) 2559 (D.N.J. 1974) (New York); *Humphrey* v. *ILA*, 548 F.2d 494, 499 (4th Cir. 1977) (Hampton Roads); *Humphrey* v. *ILA*, No. 4-75-1395 (D. Md. Mar. 25,

a. *Penalties for shortstopping*

As recounted in *ILA I*, Houff Transport, Inc. (Houff) and Associated Transport, Inc. (Associated) were common carriers that operated motor freight terminals within 50 miles of the Ports of Baltimore and Hampton Roads. *ILA I*, 447 U.S. at 501; *ILA* (*Associated Transport, Inc.*), 231 N.L.R.B. 351, 358 (1977), enforcement denied, 613 F.2d 890 (D.C. Cir. 1979), remanded, 447 U.S. 490 (1980). In 1974, employees of Houff and Associated stripped containers they had picked up at piers in the nearby ports and loaded the cargo into trailers for over-the-road transport to the consignees; in the case of Houff, its truckdriver had specifically noted that the containers were dangerously overloaded. *ILA I*, 447 U.S. at 501; *Associated Transport*, 231 N.L.R.B. at 362; Pet. App. 176a. The shipping companies that leased the containers in question were subsequently assessed liquidated damages under the Rules for each container, and when Houff and Associated refused to indemnify the companies for the fines, each carrier was threatened with cancellation of the agreement under which it leased containers. *Ibid.*

b. *Pressure to eliminate stripping of FSL containers by warehouse employees integral to distribution and storage of imported merchandise*

The Terminal Corporation is a bona fide warehouse within the meaning of the Rules operating within 50

1976) (unreported) (Baltimore); *Hirsch* v. *ILA*, No. 79-2022 (E.D. Pa. June 12, 1979) (enjoining enforcement of 30-day warehousing rule; Philadelphia). After *ILA I*, all of those injunctions were vacated except for one issued in Philadelphia. The ILA and the shipping companies agreed that the Rules would be enforced in all ports except Philadelphia beginning January 1, 1981 (Pet. App. 239a).

miles of the port of Baltimore. In 1978 and 1979, it received FSL containers of firebrick from a German manufacturer; according to the usual practice, German employees stuffed the containers, ILA labor in Baltimore unloaded them from the ship, and Terminal drivers attached the containers to tractors and drove them back to the warehouse, where other Terminal employees stripped the containers, separating out the firebrick already sold for distribution and storing the rest for future distribution pursuant to the instructions of the manufacturer. Stored firebrick was sometimes distributed in less than 30 days and sometimes held for more than 30 days, depending on the orders. Pet. App. 179a; *ILA* (*Terminal Corp.*), 250 N.L.R.B. 8, 10-11 (1980).

In March 1979, agents of ILA, its Atlantic Coast District, and two ILA locals induced members employed by a stevedoring contractor to engage in a temporary refusal to release containers to Terminal because the shipping papers did not contain the 30-day warehousing language required by the Rules. Pet. App. 179a-180a; *Terminal Corp.*, 250 N.L.R.B. at 11.

c. *Pressure to eliminate stuffing of FSL containers by warehouse employees integral to special services respecting goods for export by a single shipper*

Beck Arabia, Ltd., is engaged in various construction projects in Saudi Arabia; from its offices in Texas it orders a variety of items from a number of American suppliers for use in the Saudi projects. Under an arrangement between Beck and Shipside Packing Company, a firm that maintains a general warehouse and packing operation near the Port of Baltimore, Beck's suppliers ship the items to Shipside, which stores them temporarily until receiving

orders from Beck to consolidate particular groups of items for shipment on specified vessels. Shipside employees then stuff FSL containers for delivery to the pier by contract motor carriers. In August 1978, an agent of an ILA local induced ILA members employed by a stevedoring company to refuse to load the containers onto a ship because the ILA regarded their stuffing by non-ILA labor to be a violation of the Rules. Pet. App. 181a-182a; *ILA Local 953* (*Beck Arabia, Ltd.*), 245 N.L.R.B. 1325 (1979).

d. *Other instances of enforcement of the Rules*

On a number of occasions, enforcement of the Rules has been sought with respect to stripping or stuffing of LCL containers by NVOCCs or other freight consolidators. Pet. App. 175a-176a; *ILA* (*Consolidated Express, Inc.*), 221 N.L.R.B. 956 (1975), enforced, 537 F.2d 706 (2d Cir. 1976), cert. denied, 429 U.S. 1041 (1977); *ILA Local 1408* (*Puerto Rico Marine Management, Inc.*), 245 N.L.R.B. 1320 (1979); *ILA* (*Dolphin Forwarding, Inc.*), 236 N.L.R.B. 525 (1978), enforcement denied, 613 F.2d 890 (D.C. Cir. 1979), remanded, 447 U.S. 490 (1980). ILA affiliates have exerted coercive pressures with respect to the stripping of cold storage containers by warehouse employees who performed services similar to those performed by ILA labor in stripping containers in pier-side cold storage facilities (Pet. App. 176a-179a); *ILA Local 1242* (*Hill Creek Farms, Inc.*), Board Case Nos. 4-CC-1133, 4-CE-55 (June 27, 1979)). ILA coercive pressures have also been directed at the stuffing of export containers by warehouse employees who performed no related specialized warehousing services (Pet. App. 179a-181a; *Terminal Corp.*, 250 N.L.R.B. at 11-12).

B. *ILA I*

The Board initially concluded that the Rules violated Sections 8(b)(4)(ii)(B) and 8(e) in all their applications because their objective was not to preserve the work of bargaining unit employees but to acquire work that had been performed by employees outside the bargaining unit. See *NLRB* v. *Enterprise Ass'n of Pipefitters*, 429 U.S. 507, 517 (1977); *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612, 644-645 (1967). In *ILA I*, this Court ruled that the Board's definition of the work at issue—" 'the off-pier stuffing and stripping of containers' " (447 U.S. at 506; citation omitted)—was "incorrect as a matter of law" (*id.* at 507) because the Board "focused on the work done by the employees of the charging parties, the truckers and consolidators, after the introduction of containerized shipping" (*ibid.*). The Court held that "the Board must focus on the work of the bargaining unit employees, not on the work of other employees who may be doing the same or similar work" (*ibid.*).

The Court declined to address the question whether the Rules have a valid work preservation objective, however, because the Board had "not had an opportunity to consider th[is] question[] in relation to a proper understanding of the work at issue." 447 U.S. at 511. The Court explained the issue as follows (*id.* at 510-511; footnotes omitted):

> [The ILA and the shipping companies] assert that the stuffing and stripping reserved for the ILA by the Rules is functionally equivalent to their former work of handling break-bulk cargo at the pier. [The freight consolidators, truckers, and warehouses], on the other hand, argue that containerization has worked such fundamental changes in the industry that the work formerly done at the pier by both longshoremen and em-

> ployees of motor carriers has been completely eliminated.
>
> These questions are not appropriate for initial consideration by reviewing courts. They are properly raised before the Board, whose determinations are, of course, entitled to deference. * * * We emphasize that neither our decision nor that of the Court of Appeals implies that the result of the Board's consideration of this case is foreordained. Viewing the work allegedly to be preserved by the Rules from the proper perspective, the Board will be free to determine whether the Rules represent a lawful attempt to preserve traditional longshore work, or whether, instead, they are "tactically calculated to satisfy union objectives elsewhere," *National Woodwork*, 386 U.S., at 644.

The Court emphasized the limited nature of its ruling (447 U.S. at 511 n.26): "Our holding, we repeat, is that the Board's definition of the work in controversy was erroneous as a matter of law. The question whether the Rules may be sustained under a proper understanding of the work preservation doctrine must be answered first by the Board on remand."

C. The Board's Decision and Order on Remand

On remand, the Administrative Law Judge concluded that the Rules were invalid insofar as they applied to shortstopping and container stripping and stuffing integral to traditional warehousing practices. The ALJ concluded that the Rules were valid in other respects. The ALJ explained his ruling with respect to shortstopping as follows (Pet. App. 133a-135a; emphasis in original):

> By virtue of this practice, FSL containers are stripped at truck stations and terminals within the geographic area covered by the Rules for a variety of reasons associated with the economics of *surface* transportation. * * * Over-the-road tractor-trailers are up to 45 feet in length, and therefore have a capacity exceeding that of the modern containers. Interstate carriers will upon occasion strip the smaller containers, consolidate the cargo they contain with other goods destined for the same area and load the consolidated cargo into a 45 foot tractor-trailer. In addition, many interstate carrier systems interchange trailers at inland points for use within a multistate system. Containers have no utility within that system and if transported over the road, would have to be hauled empty back to the port area on a "dead head" run. Short-stopping may also occur because containers may not have [been] loaded in a safe manner or in compliance with State laws regulating safety of operation on the highways. Other grounds for short-stopping include the fact that [a] motor carrier is required to pay *per diem* charges on containers, a practice which is wasteful while empty trailers sit idle and are subject to utilization without additional operating cost.
>
> Based on the foregoing, it appears that the practice of short-stopping is rooted in traditional motor carrier transport cargo handling procedure, which is performed by motor carriers for their own benefit and convenience. To the extent that containers are handled for such purposes, and not under direction or for the benefit of shippers, consignees or their agents, short-stopping has no relevance to the marine leg of the intermodal network. Although skills utilized therein are indistinct from those of deepsea longshoremen in the performance of their traditional duties, it is work assumed for a different purpose, and in a different segment of the transportation industry. Short-stopping is simply a

carrier oriented, as distinguished from consumer oriented service, and as such neither competes with marine cargo handling nor amounts to a subterfuge to oust longshoremen of their traditional work.

The ALJ similarly determined that the Rules were unlawful as applied to traditional warehousing practices (Pet. App. 138a):

> [T]he public inland warehouse has always provided an intermediate freight distribution service whereby cargo could be stored for a term dictated by the owner's market demand.
>
> To this extent, warehousing practices did not change after containerization. Instead of stripping truck-trailers upon arrival at the warehouse docks, the container was stripped.

The ALJ upheld the Rules, however, insofar as they applied to freight consolidators, including both NVOCCs and warehouses that function not in their traditional role but as freight consolidators (Pet. App. 123a-132a, 139a-145a). The ALJ remarked that "there is some logic to the notion that if consolidation in containers is to be performed within the port area, it just as conveniently could be performed on the pier by longshoremen" (*id.* at 131a) and concluded that insofar as the Rules claim the offshore stripping and stuffing performed by NVOCCs within 50 miles of the port, they "constitute[] a rational effort to return to the piers, work diverted by inducements and * * * technology" (*id.* at 129a-130a).[6]

[6] The ALJ also concluded (Pet. App. 150a-172a) that the shipping companies, through their control of the containers, had sufficient control over the assignment of the work sought by the ILA to satisfy the " 'right-of-control' test of *Pipefitters*"

The Board "agree[d] with the Administrative Law Judge's findings and conclusions" (Pet. App. 57a). The Board explicitly defined "the work in dispute" as "the initial loading and unloading of cargo within 50 miles of a port into and out of containers owned or leased by shipping lines having a collective-bargaining relationship with ILA." *Ibid.* The Board noted that "no new work was created for consolidators after containerized shipping began." *Id.* at 59a. Instead, a "large part of the longshoremen's traditional work was diverted away from the pier to the consolidators." *Ibid.* The Board accordingly concluded that "the ILA had a lawful work preservation objective in claiming this work under the Rules." *Ibid.*

The Board modified the ALJ's rationale for concluding that the Rules were unlawful as applied to shortstripping and traditional warehousing functions, but it agreed with his conclusion (*ibid.*):

> The Administrative Law Judge also found that no new work was created by containerization for trucking and warehousing employees. Further, in contrast to consolidation, no work was diverted away from the pier to the truckers and warehouses as a result of containerization, at least as to those shortstopping and traditional warehousing services involved where he found violations. Rather, after containerization, some of the traditional loading and unloading work of the longshoremen, which had historically been duplicated by trucking and warehousing employees, essentially was eliminated. While we agree with the Administrative Law Judge's conclusion that the ILA had an unlawful work ac-

(*ILA I*, 447 U.S. at 504). Neither the Board nor the court of appeals overturned this determination. See Pet. App. 26a.

quisition objective in claiming this loading and unloading work * * *, we do not agree with his reliance on the fact that the work now done by the truckers and warehouses is work which was not created by containerization. Instead, we point to the fact that, because of the efficiency of the new technology, the duplicative work of the longshoremen, in handling cargo which is then rehandled by truckers and warehouses, no longer exists as a step in the cargo-handling process. * * *

D. The Decision of the Court of Appeals

The court of appeals held that "the Rules are valid in all respects" (Pet. App. 4a). It accordingly sustained the Board's order insofar as it upheld the lawfulness of the Rules, but denied enforcement of the order insofar as it held unlawful the Rules' application to shortstopping and certain warehousing practices.

The court held (Pet. App. 27a) that the Board erred as matter of law when it concluded that, because the Rules as applied to shortstopping and traditional warehousing practices "sought to preserve for the longshoremen work that had been rendered superfluous by the change in technology and not work that had been diverted to others," the Rules violated the Act in those applications. The court of appeals acknowledged that containerization had essentially not altered the truckers' work and had made the longshoremen's work unnecessary (*ibid.*):

> Prior to containerization, both the longshoremen and the truckers handled the break-bulk cargo as it moved from the ship to the consignee. * * * With containerization, the off-pier work of the shortstopping truckers remains essentially unchanged except that they unload cargo from containers instead of motor trucks. And with containerization, of course, the work formerly performed by the longshoremen has been rendered unnecessary because the container can be fastened to the chassis of a truck and transported intact to the trucking terminal or freight station.

Nonetheless, the court of appeals ruled that the Board's conclusion that the application of the Rules to shortstopping does not have a valid work preservation objective was erroneous for the following reason (Pet. App. 27a-28a):

> [T]he Board conspicuously failed to ground this conclusion * * * in the only finding of fact that might support it: that the Rules, in preserving for ILA members the right to do this initial loading and unloading, somehow deprive the truckers and warehousemen of *their* off-pier work by transferring all or some of it to longshoremen at the pier. Put another way, the Board hung the "work acquisition" tag on the Rules in these two instances without a finding that the longshoremen acquired anything. * * * [O]ne cannot possibly maintain that the stripping of import containers at the pier would in any way prevent the identical off-pier work. To repeat, truckers and warehousemen do precisely what they did before the change in technology; the longshoremen have acquired none of that work. Although the longshoremen's work in this process may well duplicate the off-pier work of truckers and warehousemen, calling this set of circumstances "work acquisition" strikes us as particularly inappropriate. [7]

[7] The court of appeals did not discuss in detail the application of the Rules to traditional warehousing practices but as-

Three judges of the court of appeals voted to rehear the case en banc (Pet. App. 33a).

REASONS FOR GRANTING THE PETITION

The Rules on Containers are incorporated in the collective bargaining agreements in effect at every major Atlantic and Gulf port. In *ILA I*, this Court noted the importance and practical significance of the question whether the Rules are lawful. 447 U.S. at 493; see *id.* at 494-496. The Rules determine the extent to which shippers can take advantage of the potentially enormous savings made possible by the growth of containerization (*ibid.*); in addition, controversies over the treatment of containers—controversies which are made more problematic by the uncertain legal status of the Rules—have been a frequent cause of industrial strife in the shipping industry (see Pet. App. 97a, 98a, 99a, 101a, 103a-104a).

The Court should grant this petition and the other petitions seeking review of the court of appeals' decision [8] in order to resolve this important issue. While there is no conflict among the circuits, as there was at the time of *ILA I*, there is a substantial likelihood that no other court of appeals will have an opportunity to address the validity of the Rules, and that therefore no other case will come to this Court in

serted that "the Board made the identical error of law with regard to both shortstopping and warehousing" (Pet. App. 27a n.8).

[8] See *American Warehousemen's Ass'n* v. *ILA*, No. 84-677 (incorrectly titled *American Trucking Ass'ns, Inc.* v. *ILA*); *International Brotherhood of Teamsters* v. *ILA*, No. 84-684; *International Ass'n of NVOCCs* v. *NLRB*, No. 84-691; and *American Trucking Ass'ns, Inc.* v. *ILA*, No. 84-696. We intend to file responses to these petitions in which we will not oppose the granting of certiorari.

which that issue is presented. In addition, the holding of the court below that the Rules are lawful as applied to shortstopping and traditional warehousing work cannot be reconciled with this Court's opinion in *ILA I*; and because of the prevalence of those practices, that aspect of the decision alone affects many persons and is of considerable economic importance. Further review is therefore warranted.

1. a. The court of appeals' decision, insofar as it overturns the Board's determination, rests on a fundamental misunderstanding of both the "work preservation" doctrine and this Court's decision in *ILA I*. Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), by its terms, prohibits employers and unions from agreeing that the employer will cease doing business with another person. The Rules on Containers, at first blush, appear to fall within this proscription; they require shipping companies not to supply containers to other persons, unless those persons permit the containers to be stuffed and stripped by employees represented by the ILA under the circumstances specified in the Rules. But this Court has held that Section 8(e) applies only to secondary activity, not to activity serving a legitimate primary purpose. See *ILA I*, 447 U.S. at 504; *Pipefitters*, 429 U.S. at 517; *National Woodwork*, 386 U.S. at 620, 635. Similarly, if a union applies pressure in an effort to enforce a provision of a collective bargaining agreement that violates Section 8(e), its activity violates Section 8(b)(4)(B), 29 U.S.C. 158(b)(4)(B), which also proscribes only secondary activity.

"Among the primary purposes protected by the Act is 'the purpose of preserving for the contracting employees themselves work traditionally done by them.'" *ILA I*, 447 U.S. at 504, quoting *Pipefitters*,

429 U.S. at 517; see *National Woodwork*, 386 U.S. at 629. The Board concluded that the Rules have a valid work preservation objective as applied to the freight consolidators because their work "is functionally equivalent to [the longshoremen's] former work of handling break-bulk cargo at the pier." *ILA I*, 447 U.S. at 510 (footnote omitted). Formerly, break-bulk cargo was delivered to the pier, where longshoremen placed it in the hold of the ship; now, break-bulk cargo is delivered to the freight consolidator, which places it in a container that will be transferred to the hold. The Board concluded that containerization (and other factors) caused this work to be moved off the pier but did not eliminate it; the longshoremen were accordingly entitled to claim it back. See Pet. App. 58a-59a.

The Board also concluded, however, that short-stopping and stuffing and stripping integral to traditional warehousing practices are not "work traditionally done by" longshoremen. Instead, these practices constitute work traditionally done by other employees—the employees of motor carriers and warehouses—for purposes quite distinct from the traditional purposes of longshoremen's work. Specifically, this work is done for purposes integrally connected to warehousing or to movement by motor carrier, such as the need to satisfy weight or balance requirements or to obtain the most efficient use of trucks and trailers. Longshoremen have never performed loading or unloading work for these purposes, and the Board concluded that the longshoremen could not claim this work just because their work may physically resemble it and require the same skills. See Pet. App. 134a-137a. Thus, these applications of the Rules are unlawful because this is "a case of a union seeking to restrict by contract * * * an employer

with respect to the [third parties with whom it deals], for the purpose of acquiring for its members work that had not previously been theirs." *National Woodwork*, 386 U.S. at 648 (Harlan, J., concurring). See also *Pipefitters*, 429 U.S. at 530 n.16.

b. The court of appeals rejected the Board's analysis for one reason alone: the Rules were lawful, the court held, because they did not "deprive the truckers and warehousemen of *their* off-pier work" (Pet. App. 27a; emphasis in original). The court of appeals reasoned that the longshoremen cannot be said to have unlawfully "acquired" work unless they acquired it from the other employees, thereby leaving the others with less work. There are at least three errors in the court of appeals' reasoning.

First, there is no basis for the court of appeals' gloss on the "work preservation" doctrine; that doctrine does not refer to the extent to which others are deprived of work. As this Court remarked in a different context in *ILA I*, "[t]he effect of work preservation agreements on the employment opportunities of employees not represented by the union * * * is * * * irrelevant to the validity of the agreement" (447 U.S. at 507 n.22). This Court has never suggested that a union is entitled to engage in secondary activity in order to acquire new work that did not traditionally belong to its employees so long as it does not deprive other employees of their work. On the contrary, as the name of the work preservation doctrine suggests, and as the Court emphasized in *ILA I* itself, the question is whether the work claimed by the bargaining unit employees is sufficiently related to the work they have traditionally performed. "[T]o determine whether an agreement seeks no more than to preserve the work of bargaining unit

members, the Board must focus on the work of the bargaining unit employees, not on the work of other employees who may be doing the same or similar work" (*ILA I*, 447 U.S. at 507 (footnote omitted)). See *id.* at 510 & n.24 (The legality of the agreement "will depend on how closely the parties have tailored their agreement to the objective of preserving the essence of the traditional work patterns."); *National Woodwork*, 386 U.S. at 646 (upholding Board determination that "the conduct of the Union * * * related solely to preservation of the traditional tasks of" bargaining unit employees).

Second, the court of appeals overlooked the fact that this Court in *ILA I* specifically contemplated that the Board might find the Rules unlawful because "containerization has worked such fundamental changes in the industry that the work formerly done at the pier by * * * longshoremen * * * has been completely eliminated." 447 U.S. at 510-511. The Board explicitly found, with respect to shortstopping and traditional warehousing practices, that the longshoremen's work has been eliminated. See Pet. App. 59a-60a. For example, as the court of appeals itself recognized (*id.* at 27a), because an import FSL container can be attached to a truck chassis and taken on the road to the owner, the work of the longshoremen—unloading the break bulk cargo from the ship and placing it at the head of the pier for collection by a truck—has been eliminated. The fact that the motor carrier might, for its own purposes, rearrange its truck loads, stripping the container in the process—that is, shortstopping—does not alter the fact that the longshoremen's work has been eliminated.

The court of appeals did not explain how its conclusion can be squared with this Court's statement

about the elimination of work in *ILA I* and the Board's finding that certain work of the longshoremen had been eliminated. This Court, in suggesting that the Board might find that the Rules do not serve a valid work preservation objective because the longshoremen's work had been eliminated, did not intimate that the Board must also find that the Rules deprive other employees of work; an agreement that attempts to regain for a bargaining unit work that has been eliminated by technological innovation will not necessarily deprive other employees of work.

Finally, the court of appeals simply assumed that, in fact, the Rules have no effect on the employees of motor carriers engaged in shortstopping or of warehouses engaged in traditional warehousing practices. In making this assumption, however, the court of appeals failed to give the proper deference to the Board's determination that the longshoremen's work had been eliminated and to the finding of the ALJ, upheld by the Board, that the work the longshoremen were seeking to acquire was traditionally that of other employees. Pet. App. 57a-59a. Moreover, the court of appeals' assumption ignores the economic realities underlying the Board's determination that the longshoremen's work had been eliminated. The court assumed that enforcement of the Rules would simply reestablish an initial, duplicative break-bulk handling by longshoremen and leave the inland work patterns of truckers and warehouses unaffected. But break-bulk handling is labor intensive and costly, and a second break-bulk handling creates an additional risk of lost or damaged goods. Any process requiring a second such handling therefore suffers a significant economic disadvantage; this is precisely why containerization grew in the first place. See 447 U.S. at 494-495.

The more reasonable assumption, therefore, is not that the longshoremen will do duplicative work but that the industry will develop practices that avoid an unnecessary break-bulk handling. For example, facilities at the pier might be modified so that longshoremen can perform the integrated tasks previously performed by truckers and warehouse employees—in which event the longshoremen would have directly deprived the other employees of their work, contrary to the court of appeals' assumption. Alternatively, if it is possible—which it will not always be (see C.A. App. 494, 509, 1094, 1112)—cargo might be diverted to truck terminals and warehouses beyond the 50-mile limit covered by the Rules (see C.A. App. 474, 538), a step that would also deprive certain motor carrier and warehouse employees of work.

2. As we have noted, and as the Court recognized in *ILA I*, the question whether the Rules are valid is of great economic importance to the shipping industry and to those who rely on it. Moreover, a definitive resolution of the validity of the Rules will promote stability in the collective bargaining process in the shipping industry.[9] While this petition concerns only certain applications of the Rules, other petitions for a writ of certiorari have been filed seeking review of the judgment of the court of appeals insofar as it upheld the Board's determination that other applications of the Rules were lawful. See page 22 note 8, *supra*.

[9] Further litigation on the legality of the Rules on Containers has a particularly great potential for disruption in the shipping industry because the collective agreement between the ILA and industry employers provides for reopening of the entire contract anytime the Rules on Containers are declared invalid as applied. Pet. App. 237a (Rule 8).

In addition, the question presented by this petition is itself of considerable practical importance because shortstopping and the warehouse practices at issue here are widespread activities. For example, in one of the ports involved in this litigation—Hampton Roads—one of the five long-haul carriers whose practices are reflected in the record shortstopped all of its loads, and a second shortstopped 90 percent, before the Rules were enforced against them. C.A. App. 493-494, 507.

The absence of a conflict among the circuits is, in our view, not a sufficient reason for the Court to deny certiorari, in light of the economic importance of the question presented and the conflict of the decision below with this Court's rationale in *ILA I*. See this Court's Rule 17.1(c). Moreover, there is a reasonable likelihood that this case will present the only opportunity for the Court to consider the validity of the Rules. The ILA is a party to each of the collective bargaining agreements that contains the Rules. The ILA can be expected to assert in other circuits that the Board is collaterally estopped from challenging the decision of the court below that the Rules are valid as applied to shortstopping and warehousing practices.[10] See *United States* v. *Stauffer Chemical Co.*, No. 82-1448 (Jan. 10, 1984). While the Board does not agree with this contention, it is not

[10] Indeed, the ILA and a leading multi-employer group of shipping companies, the New York Shipping Association (NYSA), contending that such action would be in derogation of the court's mandate, have petitioned the court below for writs of mandamus and prohibition to prevent the Board and its General Counsel from taking any action on any new unfair labor practice charges involving application of the Rules which have been, or may be, filed. *In re ILA & New York Shipping Ass'n*, No. 84-1973 (4th Cir. filed Sept. 14, 1984).

insubstantial and may be sustained by other courts of appeals or by this Court. See *Walsh* v. *ILA*, 630 F.2d 864, 871-873 (1st Cir. 1980). In that event the Board would have no other opportunity to raise this question on the merits before this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-861

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *et al.*

No. 84-696

AMERICAN TRUCKING ASSOCIATIONS, INC., and
TIDEWATER MOTOR TRUCK ASSOCIATION,

Petitioners,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Respondents.

No. 84-677

AMERICAN WAREHOUSEMEN'S ASSOCIATION,

Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC., and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Respondents.

No. 84-869

HOUFF TRANSFER, INC.,

Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS.

BRIEF FOR RESPONDENTS

(Additional captions and names of attorneys appear on inside front cover)

No. 84-691

INTERNATIONAL ASSOCIATION OF NVOCCS; FLORIDA CUSTOMS BROKERS AND FORWARDERS ASSOCIATION, INC.; TWIN EXPRESS, INC.; and INTERNATIONAL CONTAINER EXPRESS, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Respondents.

No. 84-684

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

Nos. 84-861, 84-696, 84-677,
84-869, 84-691, 84-684

NATIONAL LABOR RELATIONS BOARD,
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v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
AFL-CIO, *et al.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS

In the 117 pages of their six separate petitions, ten petitioners have been unable to assert a single reason why the Court should grant certiorari in this case. They have articulated no question of law requiring Supreme Court review.[1] They concede there is no conflict among the cir-

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[1] The questions framed in the petitions run the gamut from "[w]hether the National Labor Relations Board correctly concluded" (No. 84-861) to "[w]hether the court of appeals erred" (No. 84-684) to "[d]id the Court of Appeals apply the proper legal criteria" (No. 84-696) to "[w]as the Circuit Court correct in overturning the NLRB decision?" (No. 84-677). It is difficult to see how the answer to any of these questions would add to the development or clarification of federal labor law.

cuits.[2] Although they argue that the case is important, since it involves a major industry, they can point to no significant issue of law or policy that should be decided by the highest court. They cite no decision of this Court with which the Fourth Circuit's is in conflict.[3] They invoke an unknown ground for certiorari—"the last clear chance doctrine."[4] The entire thrust of the six petitions is dissatis-

[2] Indeed, there would appear to be complete harmony. Every jurist who has defined the work in controversy as this Court did in *NLRB* v. *Int'l Longshoremen's Ass'n*, 447 U.S. 490 (1980), arrived at the same conclusion reached by the court of appeals below. *See Intercontinental Container Transport Corp.* v. *New York Shipping Ass'n*, 426 F.2d 884 (2d Cir. 1970); *Int'l Longshoremen's Ass'n (Consol. Express, Inc.)*, 221 N.L.R.B. 956, 979 (1975) (ALJ Arnold Ordman); *Int'l Longshoremen's Ass'n* v. *NLRB*, 537 F.2d 706, 712-14 (2d Cir. 1976) (Feinberg, J. dissenting), *cert. denied*, 429 U.S. 1041, *reh'g denied*, 430 U.S. 911 (1977); *Humphrey* v. *Int'l Longshoremen's Ass'n*, 401 F. Supp. 1401 (E.D. Va. 1975) (Merhige, J.), *rev'd*, 548 F.2d 494, 500-01 (4th Cir. 1977) (Craven, J. dissenting); *Consol. Express, Inc.* v. *New York Shipping Ass'n*, 452 F. Supp. 1024, 1040 n.14 (D.N.J. 1977) (Stern, J.), *modified on other grounds*, 602 F.2d 494 (3d Cir. 1979), *vacated and remanded*, 448 U.S. 902 (1980), *on remand* 641 F.2d 90 (3d Cir.), *mandamus and prohibition denied*, 451 U.S. 905 (1981); *Int'l Longshoremen's Ass'n* v. *NLRB*, 613 F.2d 890 (D.C. Cir. 1979), *aff'd*, 447 U.S. 490 (1980).

[3] The only conflict which the petition on behalf of the National Labor Relations Board (No. 84-861 Petition at 29) can conjure up is not with a decision of this Court but only with a "rationale." Certiorari may be appropriate if a conflict exists with a decision. Sup. Ct. R. 17.1(c). No authority, however, sanctions Supreme Court review for only a disagreement in rationale. Moreover, there is no conflict. The "rationale" to which the petitioner alludes is not that of this Court but of one of the litigants in an earlier case. The petition manufactures the putative rationale by extracting a single word, "eliminated," used by the Court to describe the contention raised by a party. *NLRB* v. *Int'l Longshoremen's Ass'n*, 447 U.S. 490, 510-11 (1980).

[4] Two petitions (No. 84-696 Petition at 22; No. 84-861 Petition at 22-23, 29-30) contend that this case will probably represent the last opportunity for this Court to review the Rules on Containers. These petitioners seem to be under the misimpression that the Supreme Court is now a standing tribunal to pass on this single

(footnote continued on following page)

faction with the result below. They ask the Court to eschew its proper function and to sit simply as another layer in the appellate process.

This Court has already established the legal principles that govern the decision in this case. *NLRB* v. *International Longshoremen's Association*, 447 U.S. 490 (1980). The Court of Appeals for the Fourth Circuit easily applied them to correct a patent error of law in the decision of the National Labor Relations Board. This Court had directed the Board to decide whether the work retained by the Rules, *i.e.*, the stuffing and stripping of carriers' containers at the piers, is the historical and functional equivalent of traditional longshore work. 447 U.S. at 507. The Board, affirming its administrative law judge, found that it is and so held that the Rules on Containers are lawful work preservation provisions (Petitioners' Appendix at 53a, 59a, 119a). The court of appeals affirmed (Petitioners' Appendix at 24a). This Court had directed the Board to decide whether the longshoremen's employers had the right to assign this work to them. The Board, again affirming its administrative law judge, found that the longshoremen's employers do have the right of control (Petitioners' Appendix at 51a-52a). Once more, the court of appeals affirmed (Petitioners' Appendix at 24a).[5]

(footnote continued from previous page)

collective bargaining agreement. Moreover, the Court in another context recently refused to credit the hobgoblin of a last chance attitude. *See United States* v. *Stauffer Chemical Co.*, —— U.S. ——, 104 S. Ct. 575, 78 L. Ed.2d 388, 395 n.6 (1984) (No. 82-1448). Petitioners in this case would have been well-advised to heed the Court's instruction that there is no need to "seek certiorari from adverse decisions when such action would otherwise be unwarranted" merely out of fear that no future opportunity will arise, especially since the Court let it be known that it would not alter its "practice of waiting for conflicts to develop before granting the government's petitions for certiorari." 78 L.Ed.2d at 395 n.6.

[5] Some of the petitioners urge that the ALJ, the Board and the court of appeals were all wrong in finding right of control (No.

(footnote continued on following page)

Having completed the task assigned by this court, the Board then wandered into a manifest error of law. Despite its holding that the Rules retain for longshoremen the functional and historical equivalent of their traditional work, the Board concluded that these same Rules were unlawful when applied to containers destined for short-stopping or warehousing (Petitioners' Appendix at 59a-60a). The Board predicated this determination upon the theory that an agreement to retain work that has been eliminated is unlawful. It attempted to lend credibility to this theory by affixing the label "work acquisition" to the challenged agreement, despite the absence of any factual finding that off-pier work functions were or could be transferred to the longshoremen.[6]

The court of appeals had no difficulty disposing of the Board's error. It applied longstanding and well-settled principles of federal labor law which leave no doubt that an agreement to retain work that technological change has

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84-691 Petition at 13-24; No. 84-696 Petition at 17-21). They claim that these tribunals should have taken into account the proscriptions of federal shipping law in determining the legality of the Rules under federal labor law. The approach suggested would require the NLRB to decide difficult questions arising under the shipping statutes which the Federal Maritime Commission, the agency to which Congress has entrusted this task, has not yet resolved. The legality of the Rules under federal shipping law is presently before the FMC. *See 50 Mile Container Rules*, FMC No. 81-11. These shipping law questions are hardly ripe for review by this Court.

[6] Some of the petitioners seek to supply the missing factual finding by constructing scenarios in which off-pier work might be lost (No. 84-861 Petition at 27-28; No. 84-869 Petition at 15; No. 84-696 Petition at 12; No. 84-684 Petition at 10 n.7). None of these hypothetical occurrences is alleged to have happened in fact. None was invoked by the Board as a basis for its decision. None is a necessary consequence of the Rules but comes about only as a result of the choice of off-pier employers.

eliminated as a necessary function is perfectly permissible primary activity (Petitioners' Appendix at 26a-29a).[7]

The plea for a "definitive resolution of the validity of the Rules" (No. 84-861 Petition at 28) is disingenuous. The Fourth Circuit's decision is definitive.[8] It brings the verdict on the Rules into congruence with the law enacted by Congress and elucidated by this Court. It puts to rest all uncertainties concerning the validity of the Rules and thus achieves the labor stability which the Board purportedly espouses. It is the Board which would prolong the discord, not to seek a definitive resolution but a favorable one.[9]

Litigation over the Rules on Containers over the past 15 years since their adoption has consumed an inordinate amount of judicial and administrative resources. It has

[7] The bulk of every petition is devoted to an attempt to reargue the merits of the case before the Fourth Circuit. This is inappropriate in an application for a writ of certiorari and, accordingly, this brief will not respond in kind. However, respondents are appending their reply brief below, should the Court wish to know their position on the merits.

[8] The decision of a United States court of appeals is definitive, notwithstanding the Board's refusal to admit it. The NLRB makes no bones about its policy of disregarding decisions of federal appellate courts with which it is displeased. Although this policy has been strongly criticized by ten circuits, the Board persists. Its refusal to abide by the decision in this case, pending application to this Court, prompted respondents to petition for writs of mandamus and prohibition to compel the Board to comply by discontinuing further litigation it had initiated against the Rules in derogation of the decision of the court of appeals. *In re Int'l Longshoremen's Ass'n*, No. 84-1973 (4th Cir. filed Sept. 14, 1984).

[9] Inexplicably, the Board has indicated its intent (No. 84-861 Petition at 22 n.8) not to oppose the petitions which seek review of that portion of the decision below which sustained the validity of the Rules, where a unanimous court affirmed a unanimous Board in affirming its administrative law judge. With that kind of unanimity, one would think that those issues at least have been definitively adjudicated. It is difficult to reconcile the Board's willingness to reopen these issues with its goal of certainty and stability.

generated 13 circuit court, 14 district court and 10 NLRB proceedings, as well as two determinations on the merits by this Court. The decision of the court of appeals below has brought the wheel full circle. The status of the Rules on Containers is precisely where it was after the first ALJ found them to be lawful work preservation provisions almost a decade ago. *International Longshoremen's Association (Consolidated Express, Inc.)*, 221 N.L.R.B. 956, 979 (1975) (ALJ Arnold Ordman). The time has come to say "Enough!" The pique of disappointed litigants is no basis to add another unnecessary chapter. There is no reason for Supreme Court review. The petitions should be denied.

Dated: New York, New York
December 27, 1984

Respectfully submitted,

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ADDENDUM

United States Court of Appeals
FOR THE FOURTH CIRCUIT

No. 83-1185(L)

AMERICAN TRUCKING ASSOCIATIONS, INC. and
TIDEWATER MOTOR TRUCK ASSOCIATION,

Petitioners,

and

HOUFF TRANSFER, INC., AMERICAN WAREHOUSEMEN'S ASSOCIATION
and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA,

Intervenors,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL
OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Intervenors.

No. 83-1214

INTERNATIONAL ASSOCIATION OF NVOCCS, FLORIDA CUSTOMS BROKERS
AND FORWARDERS ASSOCIATION, INC., TWIN EXPRESS, INC., and
INTERNATIONAL CONTAINER EXPRESS, INC.,

Petitioners,

and

SAN JUAN FREIGHT FORWARDERS, INC.,

Intervenor,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 83-1424

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, HAMPTON ROADS DISTRICT COUNCIL; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ATLANTIC COAST DISTRICT COUNCIL; INTERNATIONAL LONGSHOREMEN'S DISTRICT COUNCIL BALTIMORE, MARYLAND; ILA LOCALS 333, 846, 862, 921, 953, 970, 1248, 1355, 1416, 1416A, 1429, 1458, 1526, 1526A, 1624, 1680, 1736, 1783, 1784, 1819, 1840, 1922, and 1970, AFL-CIO; HAMPTON ROADS SHIPPING ASSOCIATION; SOUTHEAST FLORIDA EMPLOYERS PORT ASSOCIATION; CO-ORDINATED CARIBBEAN TRANSPORT, INC.; CHESTER BLACKBURN & RODER, INC.; EAGLE, INC.; ELLER & COMPANY, INC.; STRACHEN SHIPPING COMPANY; and MARINE TERMINALS, INC.,

Respondents.

SHIPPING GROUP'S REPLY BRIEF

No. 83-1486

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Petitioners,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

HOUFF TRANSFER, INC., INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, TIDEWATER MOTOR TRUCK ASSOCIATION, and AMERICAN TRUCKING ASSOCIATIONS, INC.,

Intervenors.

ON PETITIONS TO REVIEW AND ON APPLICATIONS TO ENFORCE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

SHIPPING GROUP'S REPLY BRIEF

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No. 83-1185(L)

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Petitioners,

and

HOUFF TRANSFER, INC., AMERICAN WAREHOUSEMEN'S ASSOCIATION and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Intervenors,

—v.—

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,
Intervenors.

ON PETITIONS TO REVIEW AND ON APPLICATIONS TO ENFORCE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

SHIPPING GROUP'S REPLY BRIEF

As to the Trucking Group:

The NLRB's and Shipping Group's principal briefs leave no doubt that the Rules on Containers are lawful work preservation provisions on their face. These briefs dispose of the contentions advanced by the Trucking Group.

The work preservation argument that the Trucking Group urges depends upon the existence of a "new intermodal transportation system" into which it claims that the work of stuffing and stripping the longshore employers' containers has been inseparably integrated (Trucking Group's Brief ("TGB") at 12-31). Both the ALJ and the

Board found otherwise (Bd at 16 (A. 163); ALJ at 31-37 (A. 44-50)). Their factual determinations are supported by an abundance of record evidence (A. 254, 258, 266-67, 322, 342-43, 351-52, 383-89, 426-28, 432-33, 452-54, 469-71, 545, 598-99). Moreover, the Trucking Group's argument has already been rejected by the District of Columbia Circuit. *International Longshoremen's Association* v. *NLRB ("ILA")*, 198 U.S. App. D.C. 157, 613 F.2d 890, 909-10 & n.173 (1979), *aff'd*, 447 U.S. 490 (1980). The Trucking Group's obstinate adherence to its discredited theory is futile.

The Trucking Group's right of control argument rests upon two fictions. First, it claims that the Board never considered the right of control issue (TGB at 32-37)—an untenable contention in light of the ALJ's careful analysis (ALJ at 58-60, 75 (A. 71-73, 88)), which was adopted by the Board (Bd at 18 n.30 (A. 165)). Second, the Trucking Group's invocation of contractual common-carrier obligations (TGB at 37-45) would require the NLRB to determine the validity of the Rules on Containers under federal shipping law—an endeavor the Federal Maritime Commission has not yet been able to complete to the satisfaction of an appellate court.[1] The Board correctly declined to trespass upon an area beyond its jurisdiction, *Local 1976, Carpenters* v. *NLRB ("Sand Door")*, 357 U.S. 93, 110-11 (1958), and rightfully branded any linkage of the outcome of this labor law case to the uncertainties of pending FMC litigation "mischievous." (ALJ at 72 (A. 85)).

[1] *Sea-Land Service, Inc.—Proposed Rules on Containers*, 21 F.M.C. 1 (1978), *aff'd in part and remanded in part sub nom. Council of North Atlantic Shipping Associations* v. *FMC*, 217 U.S. App. D.C. 318, 672 F.2d 171, *cert. denied*, 103 S. Ct. 69 (1982), *on remand* Nos. 73-17 & 74-40 (FMC May 19, 1982), *vacated and remanded*, No. 78-1776, Supplemental Opinion Following Remand (D.C. Cir. July 2, 1982), *reh'g en banc denied*, No. 78-1776 (D.C. Cir. Sept. 23, 1982).

As to the NLRB:

The only real issue in this case is the legal soundness of the Board's trucking and warehouse rulings. The NLRB's brief ("NB") leaves no doubt that this issue is purely one of law (NB at 50-54).

1. *The Board's Decision*

The Board's ruling invalidated application of the Rules to certain trucking and warehouse operations purportedly because it was work acquisition (Bd at 26-27 (A. 173-74)). The Shipping Group's Brief ("SGB") showed that the conclusion of work acquisition was a mere assumption unsupported by any finding of fact or record evidence (SGB at 42-49). Indeed, the Shipping Group demonstrated that the stripping/stuffing of containers at the piers can in no way lessen the work performed by trucking or warehouse employees at off-pier sites (SGB at 42-46). Since, without work loss, there can be no acquisition, the Shipping Group exposed the Board's finding of illegality as one predicated solely on its conclusion that longshore work has been "eliminated." (SGB at 47-48).

The Board's brief to this court concedes the correctness of the Shipping Group's analysis. The NLRB has now abandoned any pretense of work acquisition. The word "acquisition" appears four times in the 64 pages of the Board's brief (NB at 23, 39, 49), but only once in connection with the Board's decision in this case (NB at 49). Even here, it is not given its ordinary meaning. It is dressed up in quotation marks, suggesting that the Board in its decision did not mean that longshoremen were in fact acquiring work in the real world but, rather, used the term "acquisition" as a technical catchword to denote unlawful activity.

Just as in the Board's and ALJ's decisions work acquisition is an assumption, not a finding of fact, so too

in the Board's brief to this court. There is not a single citation in that brief to any record evidence in support of a factual finding that application of the Rules to truckers and warehousemen caused longshoremen to acquire the off-pier employees' work. If work acquisition had really been a factual determination in its decision, one would expect the Board to point to those portions of the record that support its finding. After having received the Shipping Group's brief, which openly challenges any claim that off-pier work is being acquired, surely the Board's brief would have responded by supplying the missing evidentiary support. It does not because none exists. Instead, the Board jettisons "work acquisition" as a necessary element and now seeks to persuade this court that work "elimination" alone suffices to overcome the Board's own determination that the Rules are generally valid work preservation provisions.

The Board's brief confirms the Shipping Group's demonstration that the decision under review is predicated on the principle of law that eliminated work may not be the subject of a lawful work preservation agreement. The Board's brief states that "agreements to cease doing business in connection with claiming work that technology has eliminated are not primary agreements." (NB at 52). This is an error of law.

The Board cites no authority in support of its theory because neither the NLRB itself nor any judicial tribunal has ever endorsed it. The controlling authorities have consistently upheld agreements to preserve or reacquire eliminated work. *National Woodwork Manufacturers Association* v. *NLRB,* 386 U.S. 612 (1967), *aff'g in part and rev'g in part* 354 F.2d 594 (7th Cir. 1966); *American Boiler Manufacturers Association* v. *NLRB,* 404 F.2d 547 (8th Cir. 1968), *cert. denied,* 398 U.S. 960 (1970); *Meat Drivers Local 710* v. *NLRB,* 118 U.S. App. D.C. 287, 335 F.2d 709 (1964).

2. *The Board's Brief*

The Board's decision in this case rests upon the naked assertion that the attempt to preserve eliminated work is illegal work acquisition (Bd at 27 (A. 174)). In an effort to rescue this implausible postulate, the Board's counsel goes to even more extreme lengths, which, rather than salvage the Board's decision, actually underscore its fundamental infirmities. The Board's counsel conjures up something old and something new. He introduces a distinction never before voiced and dredges up an old discredited theory. Neither of these appear in the Board's decision.[2]

First, the Board's brief attempts to undermine the well-established law of work preservation by introducing a spurious distinction never before drawn either in the decision on review or in any prior case. The Board's counsel claims that the legality of the agreement turns on whether the work has been "eliminated" or "diverted." (NB at 52). This semantic game is devoid of legal significance.[3] From the point of view of the workers, it matters not whether the work has been transferred to another work site or gone to the Valhalla of the victims of tech-

[2] These *post hoc* rationalizations by agency counsel are unacceptable to support the decision on review. *FPC* v. *Texaco, Inc.,* 417 U.S. 380, 397 (1974); *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168-69 (1962); *Edward J. DeBartolo Corp.* v. *NLRB,* 662 F.2d 264, 271-72 n.6 (4th Cir. 1981). An appellate court must adjudge an administrative decision on the basis of the reasons articulated in the agency's decision itself. *SEC* v. *Chenery Corp.,* 332 U.S. 194, 196 (1947); *Austin* v. *Jackson,* 353 F.2d 910, 912 (4th Cir. 1965).

[3] Board counsel's distinction is logically distorted. Manifestly, attempts to reinstate "diverted" work require a greater involvement of third parties than the resuscitation of "eliminated" work. Both are lawful work preservation, but the former is nearer the dividing line between primary and secondary activity.

nology. In either case, their work is lost, and the workers' efforts to compel their employer to return it are primary.

The controlling cases simply do not bear out Board counsel's attempted distinction. The Supreme Court in *National Woodwork* did not speak in terms of "diverted" or "displaced" work, but rather "employers' efforts to *abolish* . . . jobs." 386 U.S. at 640 (emphasis added). So too, the Eight Circuit in *American Boiler* and the District of Columbia Circuit in *Meat Drivers* sanctioned the recovery of *"lost"* work. 404 F.2d at 554; 335 F.2d at 712 (emphasis added). Moreover, the facts in these cases reveal that the work in controversy had been eliminated, not merely diverted. In *National Woodwork,* the work of cutting and fitting blank doors had been integrated into the manufacturing process. There were no carpenters at the manufacturers' plants to whom the work was diverted. The machines produced doors already fitted to their jambs. The work of mortising, routing and beveling had been eliminated by the prefabrication technology. The prepackaged boilers in *American Boiler* had the same work elimination effect. The manufacturing process had abolished, not diverted, the plumbers' on-site trimming work.

In *Meat Drivers,* the work of distributing meat products within the 50-mile Chicago area from a metropolitan processing plant had been eliminated by the establishment of a suburban plant. Distribution from the city plant was no longer a necessary step in the process of getting the meat from the suburban plant to the Chicago customers. The court of appeals upheld an agreement requiring the employer to have the meat transported first to the city plant thence to the customers by its employees at that plant rather than directly from the suburban plant to the customers by independent over-the-road truckers retained by the employer. *Meat Drivers* is particularly instructive

because it demolishes the Board's attempt in this case to introduce "duplication" as a disqualifying factor (Bd at 26-27 (A. 173-74)). Obviously, delivery directly from the suburban plant was a more economical, convenient and efficient practice. Transfer to the city plant was a duplicative, make-work step. Nevertheless, the city employees' insistence that it be done to reintroduce their lost work was lawful, primary activity, even though it had the effect of disrupting the employer's arrangements with the over-the-road contractors.[4]

Second, the Board's brief reaches back to an earlier era to urge that it is the "cease doing business" factor which makes the attempt to preserve eliminated work unlawful (NB at 53 and n.43). The case cited for this proposition, *Painters & Paperhangers Local 27 (Glaziers) (Joliet Contractors Association),* 99 N.L.R.B. 1391 (1952), *aff'd sub nom. Joliet Contractors Association* v. *NLRB,* 202 F.2d 606 (7th Cir.), *cert. denied,* 346 U.S. 824 (1953), was decided not only prior to *National Woodwork* but also before the 1959 amendments to § 8(b)(4) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 158(b)(4) (1976), which introduced the proviso "that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."[5]

Prior to the enactment of the primary proviso, it was tenable to suggest that a violation could be predicated on a mere cessation of business. Indeed, the Seventh Circuit in reviewing *Glaziers* said "we are not convinced that

[4] The Board itself reached a similar result in *Plumbers Local 636 (Mechanical Contractors Ass'n),* 189 N.L.R.B. 661 (1971) where a duplicative practice of disassembling and repiping prefabricated units was upheld as valid work preservation.

[5] The courts extended this primary proviso to agreements challenged under LMRA §-8(e), 29 U.S.C. § 158(e) (1976). *See National Woodwork,* 386 U.S. at 634-43.

a Union violation . . . is dependent upon whether its activities are primary or secondary." 202 F.2d at 610. Once Congress passed the proviso, however, *Glaziers* lost all precedential value, and a different mode of analysis was mandated.[6]

Under the present state of the law, three elements are necessary to establish a violation of LMRA § 8(b)(4) or § 8(e): (1) inducement (threats or coercion), (2) cessation of business, and (3) secondary objective. While it is still necessary to find a cessation of business, that element is no longer determinative. It must be shown that the cessation is a result of secondary, not primary, activity. The primary/secondary analysis is the crucial touchstone, and it is totally independent of the cessation of business element. The primary/secondary determination turns upon the motivation for the cessation. Where the cessation is the result of primary activity, no violation occurs. Thus, the Supreme Court has repeatedly held that the effect on third parties, *i.e.*, the cessation of business, "no matter how severe, is irrelevant to the validity of the agreement so long as the union had no forbidden secondary purpose to affect the employment relations of the neutral." *ILA*, 447 U.S. at 507 n.22, *citing NLRB* v. *Enterprise Association of Steam, etc. Pipefitters*, 429 U.S. 507, 510, 526 (1977); *see also National Woodwork*, 386 U.S. at 627.[7]

[6] In its later determination in *National Woodwork*, the Seventh Circuit itself recognized the obsolescence of its prior affirmance of *Glaziers*. 354 F.2d at 598.

[7] This same analysis has been articulated by the Supreme Court:

> Under § 8(b)(4)(B) of the National Labor Relations Act, 29 USC § 158(b)(4)(B), a union commits an unfair labor practice when it induces employees to refuse to handle particular goods or products or coerces any person engaged in commerce, where 'an object' of the inducement or coercion is to require any person to cease doing business with any other person. A proviso, added to § 8(b)(4)(B) in 1959, declares that the section 'shall [not] be construed to make

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The theory now proposed by the Board's counsel, which makes the cessation of business the crucial factor, would in effect repeal the primary proviso. Since even the most pristine primary work preservation agreement has some effect on third parties, which, as the Board reminds us, is sufficient to make out a cessation of business (NB at 29 n.26, *citing NLRB* v. *Local 825, Operating Engineers*, 400 U.S. 297 (1971)), virtually every work preservation agreement would be vitiated if Board counsel's view were to prevail.[8]

Board counsel's attempts to buttress the decision under review are unavailing. His diversion/elimination distinction and "cessation of business" theory are contrary to well-established precedent and to the express provisions of the statute. However, they serve one useful purpose. They betray a recognition that the Board's decision as ren-

(Footnote Continued From Preceding Page)

> unlawful, where not otherwise unlawful, any primary strike or primary picketing.' Although without the proviso the section on its face would seem to cover any coercion aimed at forcing a cessation of business, the National Labor Relations Board (Board) and the judiciary have construed the statute more narrowly, both before and after the proviso was added, to prohibit only secondary, rather than primary, strikes and picketing.
>
> Among other things, it is not necessarily a violation of § 8(b)(4)(B) for a union to picket its employer for the purpose of preserving work traditionally performed by union members even though in order to comply with the union's demand the employer would have to cease doing business with another employer.

Pipefitters, 429 U.S. at 509-10 (footnotes and citation omitted).

[8] The change in business practices which would constitute the "cessation of business" element of the Board's trucking and warehouse rulings in this case is minimal. It consists of the delivery of cargo to off-pier sites in a truck rather than a steamship carrier container. To the off-pier employees the vehicle in which the cargo is transported makes no difference. Their work is the same in either case. The change in business practices is so slight and insubstantial as to place in doubt whether the "cessation of business" element has in fact been established. *See Operating Engineers, supra*, 400 U.S. at 305. If the alleged "cessation" in this case suffices, what work preservation agreement could survive?

dered needs shoring. The fact that the best support Board counsel was able to devise is insufficient shows that the decision is indefensible.

3. *The Controlling Law*

The Board's trucking and warehouse rulings are unable to withstand scrutiny under the basic principles of the work preservation doctrine. In this case, however, there is a more definitive standard—the Supreme Court's decision in *ILA,* which dealt with this very litigation. The Board's rulings part company with *ILA* in every respect. The *ILA* Court admonished the Board for erroneously focusing "on the work done by the employees of the charging parties, the truckers and consolidators, after the introduction of containerized shipping." *Id.* at 507.[9] In its trucking and warehouse rulings, the Board continues to define the work in dispute as the post-containerization work performed by the trucking and warehouse employees (Bd at 24 (A. 171)).[10]

The *ILA* Court required the Board to focus on the longshoremen's work prior to the innovation and to evaluate the

[9] Neither the Supreme Court nor the District of Columbia Circuit in *ILA* nor any other tribunal which has addressed this case has ever made any distinction between application of the Rules to consolidators and their application to truckers and warehousemen. The reason is self-evident. The traditional work of longshoremen and the on-pier work the Rules seek to retain are the same whether the container comes from/goes to a consolidator, NVO, trucker or warehouseman. Regardless of the off-pier entity, the longshoremen perform the same work. The test in each instance remains the same: whether that work is historically and functionally related to traditional longshore work, and the Board has answered that question in the affirmative.

[10] Even if the Board's "elimination" theory were not legally erroneous, it would still be reversible error for the Board to apply that theory in this case. The Board disregards the Supreme Court's direction. It views the Rules on Containers in hindsight. While it is true that containerization had the potential for eliminating longshore work, this elimination with respect to warehousing and shortstopping had not occurred at the time that the Rules were adopted in 1969. From the inception of containerization un-

(Footnote Continued on Succeeding Page)

functional and historical relationship between this traditional longshore work and the work retained by the Rules. 447 U.S. at 507, 509-10. In its trucking and warehouse rulings, although it had already found that the work the Rules propose to preserve is functionally and historically related to traditional longshore work and has not been integrated into off-pier work practices (Bd at 16, 24-27 (A. 163, 171-74); *see also* NB at 34-37), the Board simply eschewed these critical findings and embarked upon its "elimination" theory.

The Board's theory cannot be reconciled with *ILA.* The Supreme Court recognized that the need for longshore work had been eliminated by containerization, 447 U.S. at 509, but did not consider this elimination to be a determinative factor. The Court mandated a further inquiry:

> whether the historical and functional relationship between this retained work and traditional longshore work can support the conclusion that the objective of the agreement was work preservation rather than the satisfaction of union goals elsewhere.

447 U.S. at 510 (footnote omitted). The Court thus zeroed in on the key factor for determining a violation of §§ 8(b)(4) and 8(e): whether the challenged agreement has a primary or secondary objective—an inquiry the Board

(Footnote Continued From Preceding Page)
til the 1973 Dublin Supplement, containers destined for stripping at local warehouses and trucking stations were routinely stripped at the piers (A. 1082-83, 1085-86, 1159-60, 1181). In the Dublin Supplement, the longshoremen agreed not to strip warehouse-bound containers but only on the condition that their contents be genuinely warehoused for the customary 30-day period. It was to preserve this work from elimination that the Rules were adopted. Any elimination that may have occurred thereafter resulted from 10 years of injunctions, not from "the technology, as the ILA agreed to have it operate." (NB at 49). Thus, the "elimination" upon which the Board's theory depends did not exist at the time the agreement was adopted, the temporal context in which, under the Supreme Court's decision, the Rules must be adjudged.

completely loses sight of in concocting its elimination theory.

The Supreme Court has repeatedly said that the "touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees." *National Woodwork,* 386 U.S. at 645 (footnote omitted); *Pipefitters,* 429 U.S. at 511; *ILA,* 447 U.S. at 504. The Board had no difficulty finding that the agreement to have longshoremen stuff and strip their own employers' containers at their own employers' premises "had an overall work preservation objective." (Bd at 25 (A. 172)). The touchstone, therefore, was completely satisfied. In its trucking and warehouse rulings, the Board does not mention the touchstone. It offers no explanation how the longshoremen's "valid work preservation objective" becomes secondary when their agreement is applied to warehousemen and truckers. The fact that in those instances the Board believes the work has been "eliminated" in no way changes the primary nature of the agreement. The longshoremen are still bargaining with their own employers to have them revive the lost work. If, as the Board suggests, the work has in fact been eliminated, no other employees can be doing it. The longshoremen's agreement, then, cannot be "tactically calculated to satisfy union objectives elsewhere." *National Woodwork,* 386 U.S. at 644. Nothing can be more primary than an agreement to preserve "eliminated" work.

The only way such an agreement could become secondary would be if its application reached out to acquire other employees' work not previously performed by the contracting employees. *National Woodwork,* 386 U.S. at 630-31 and at 648 (Harlan, J. concurring). In this case, unlawful acquisition could occur only if the longshoremen's work had become inseparably integrated into the work of the off-pier employees—which the Board in this case found not to be the fact (Bd at 16, 24-27 (A. 163, 171-74); ALJ at 31-37 (A. 44-50)).[11] The Board's decision did not find, nor does the Board's brief claim, that any off-pier work is being transferred to the docks by application of the Rules. *See* pp. 3-4 *supra*. The invocation of "elimination" does not supply the necessary secondary element.

The Board recognizes that acquisition is necessary. The bottom line of its decision is, "Therefore, we conclude that the Rules on Containers as applied to shortstopping and traditional warehousing practices have an illegal work acquisition objective." (Bd at 27 (A. 174)). However, in the light of its own factual findings, the Board cannot say that the work of off-pier employees is being acquired. Rather, it attempts to justify its decision by labelling as "acquisition" the attempt to retain "work that the technology, as the ILA agreed to have it operate, 'eliminated the need for.'" (NB at 49). This "eliminated" work is longshore work, not off-pier work. Unlawful acquisition occurs only when the work acquired is someone else's. Only then is it secondary. Acquiring one's own work is quintessentially primary. Indeed, it is not acquisition at all. It is work preservation.

The Board attempts to stigmatize this perfectly lawful conduct by expanding the term "acquisition" to include that which it has never meant in a manner that obliterates the distinction between primary and secondary. The Board appeals to this court to defer to the Board's discretion (NB at 51, 53). But judicial deference is neither absolute nor blind. *NLRB* v. *Brown,* 380 U.S. at 278, 292 (1965); *NLRB* v. *Babcock & Wilcox Co.,* 351 U.S. 105, 112 (1956). It does not include sanctioning an Orwellian perversion of the plain meaning of the language which, if unchecked, would abolish the doctrine of work preservation.

[11] The opponents of the Rules have always recognized the need for integration to invalidate the Rules. They have always predicated their challenge on the contention, albeit fallacious, that longshore work has been inseparably integrated into the "new intermodal transportation system." *See, e.g.,* TGB at 17.

CONCLUSION

For the foregoing reasons and those set forth in the Shipping Group's Principal Brief, the Board's trucking and warehouse rulings should be reversed, the applications for enforcement in Nos. 83-1424 and 83-1486 denied, and the Rules on Containers declared lawful work preservation agreements in their entirety.

Dated: New York, New York
October 17, 1983

Respectfully submitted,

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(9)

No. 84-861

IN THE

Supreme Court of the United States

October Term, 1984

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT AMERICAN WAREHOUSEMEN'S ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

As applied to traditional functions of public warehouses in handling shipments, was the National Labor Relations Board correct in concluding that the Rules On Containers which divert such work from warehouses lack a valid work preservation objective and constitute unlawful secondary activity under Sections 8(b)(4)(B) and 8(e) of the National Labor Relations Act?

PARTIES TO THE PROCEEDING

In addition to the National Labor Relations Board and the International Longshoremen's Association, AFL-CIO, the following were parties: Council of North Atlantic Shipping Associations; ILA Hampton Roads District Council; ILA Atlantic Coast District Council; ILA District Council, Baltimore, Maryland; ILA Locals 333, 846, 862, 921, 953, 970, 1248, 1355, 1416, 1416-A, 1429, 1458, 1526, 1526-A, 1624, 1680, 1736, 1783, 1784, 1819, 1840, 1922, and 1970, AFL-CIO; Hampton Roads Shipping Association; Southeast Florida Employers Port Association; Coordinated Caribbean Transport, Inc.; Chester, Blackburn & Roder, Inc.; Eagle, Inc.; Eller & Company, Inc.; Harrington & Company, Inc.; Strachen Shipping Company; Marine Terminals, Inc.; American Trucking Association, Inc.; Tidewater Motor Truck Association; New York Shipping Association; International Association of NVOCCs; Florida Custom Brokers and Forwarders Association, Inc.; Twin Express, Inc.; International Container Express, Inc.; Houff Transfer, Inc.; International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America; American Warehousemen's Association; and San Juan Freight Forwarders, Inc.

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Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF
AMERICAN WAREHOUSEMEN'S ASSOCIATION

OPINIONS BELOW

The opinion of the court of appeals is reported at 734 F.2d 966. The decision and order of the National Labor Relations Board and the decision of the administrative law judge are reported at 266 N.L.R.B.230.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1984. A petition for rehearing was denied on July 31, 1984. On January 21, 1985, the Petition of the National Labor Relations Board for a Writ of Certiorari was granted. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(b) of the National Labor Relations Act, 29 U.S.C. 158(b), provides in pertinent part:

It shall be an unfair labor practice for a labor organization or its agents-

* * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any service; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is-

* * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing ***.

Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), provides in pertinent part:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void ***.

STATEMENT OF THE CASE

The concept of freight containerization as a system designed to eliminate inefficiencies was introduced in the late 1950's. Instead of loading individual shipments aboard a ship, many separate shipments could be loaded at point of manufacture or storage into a single container which would then be handled mechanically from origin to ultimate destination. No intermediate manual freight handling was required.

The result of containerization was a reduction in the volume of cargo to be loaded into the holds of ships by longshoremen. Labor problems were thus precipitated and culminated in the negotiation of the Rules on Containers which essentially provided that if containers owned or leased by the shipping companies were to be stuffed or stripped within a 50 mile radius of a port by anyone other than employees of the beneficial owner of the cargo such work had to be done at the pier by ILA labor, except for import containers loaded only with goods owned by one shipper and warehoused for at least 30 days.

When initially considered, the NLRB held that the Rules violated the NLRA's proscriptions against secondary activity. In *NLRB* v. *International Longshoremen's Ass'n,* 447 U.S. 490 (1980) a sharply divided Court concluded that the NLRB's definition of the work in controversy "reflect(ed) a fundamental misconception of the work preservation doctrine" and was consequently "erroneous as a matter of law." 447 U.S. at 507, 511 n.26. The case was remanded with instructions to the NLRB to reconsider the unfair labor practice complaints in light of the principals set forth by the Court.

The Chief Justice, joined by three Justices, dissented, expressing the view that the Rules, in seeking to control the stuffing and stripping of containers away from the pier, were invalid under sections 8(e) and 8(b)(4)(B) of the NLRA.

On remand the NLRB found that the Rules sought to preserve work for longshoremen which was historically and functionally related to their traditional, pre-containerization work. Also, the shipping companies had the right to control who loaded freight into their containers. Consequently, the Rules were acceptable work preservation measures and not in violation of the secondary boycott provisions of the NLRA.

The work preservation justification for the Rules was not, however, found applicable to certain functions of public warehousemen and truckers, namely those which had traditionally been performed by warehouse and trucking labor prior to containerization.

The Fourth Circuit Court of Appeals held that the NLRB had misapplied the doctrine of work preservation in concluding that the Rules were unlawful with respect to warehousing and trucker functions, but had correctly applied the doctrine to the balance of the Rules. Thus it held that the Rules were lawful in their entirety.

SUMMARY OF ARGUMENT

The NLRB's decision, supported by substantial evidence, correctly applies the analysis suggested by this Court, namely that the interrelated functions of the distribution industry must be considered in light of the transformation of work caused by containerization.

The NLRB correctly ruled that the longshoremen's attempt to reach work traditionally done by public warehousemen was work acquisition, not preservation.

ARGUMENT

Public warehouses occupy a unique and necessary place in the system of distribution. The functions of the public warehouse were described in the 1929 case of *Gallagher* v. *Pennsylvania R. Co.*, 160 ICC 563-565 (1929), where the Interstate Commerce Commission stated:

> "... public warehouses are customarily used for the receipt, storage and distribution of merchandise. That these warehouses perform an important public service is undisputed. The merchandise warehouse receives goods in carloads and distributes them in smaller quantities to local jobbers or retailers, or reships them in less-than-carload lots to near-by destinations; issues negotiable and non-negotiable receipts, provides insurance, and allows credit to be obtained on merchandise stored; provides recoopering, marking, and separation of varieties and various incidental clerical services. Warehouse services enable manufacturers to keep spot stocks for their customers; equalize production by steadily absorbing the manufacturers' output while eliminating heavy investment in reserve storage space; reduce freight charges and save time in transit through handling goods in carload quantities; reduce fire risk and loss and damage claims; and eliminating the necessity of providing storage space at point of origin."

A more recent textbook, one of the standards in the field of distribution, Bowersox, Smykay & LaLonde, *Physical Distribution Management,* page 255, (rev. ed. 1968), describes the function of the merchandise warehouse as follows:

> "The distribution warehouse contains goods on the move. Because the operation is essentially a breakbulk and regrouping procedure, the objective is to effectively move large quantities of products and customize orders of products out of the warehouse."

With respect to the goods moving as containerized freight these traditional warehouse functions continue to be performed. As found by ALJ Harmatz:

> Prior to containerization, import cargo would be picked up at the piers by common carrier, delivered to a warehouse, where a trailer or truck would be unloaded, with the cargo stored, segregated, palletized, and placed in a designated storage area. Depending upon the consignee's needs, the cargo would be removed from the warehouse, distributed, or delivered. Thus, the public inland warehouse has always provided an intermediate freight distribution service whereby cargo could be stored for a term dictated by the owner's market demand.
>
> To this extent, warehousing practices did not change after containerization. Instead of stripping truck-trailers upon arrival at the warehouse docks, the container was stripped. In this sense, the container afforded no change in the warehousemen's method of handling inbound freight, but simply reflected a change in equipment through which the truck-trailer was supplanted by the container. (Pet. App. pg. 138a)

The ALJ similarly recognized the type of warehouse functions traditionally performed with respect to export shipments.

> Such an exception is evident in the historic operations of Mahon Express, Inc. Mahon for many years has provided warehousing services for certain retail chain stores, including Woolworth, K-Mart and Kreske, which have retail outlets in the Caribbean. These retail chains obtain their inventories from a variety of manufacturers. Instead of maintaining a private warehouse for receipt of such deliveries, insofar as destined for the Caribbean these chains directed their suppliers to deliver to Mahon. The goods were segregated by Mahon and ultimately loaded into trailers prior to containerization for the delivery to the pier. Subsequent to containerization, Mahon's employees stuffed the cargo into containers for delivery to the pier. A further exception appears in testimony of Poul Rosander pertaining to the stuffing of books and magazines, requir-

ing special processing at the warehouse operated by Wilson Container Co., Inc. See footnote 46, *supra*. Application of the Rules on Containers to such services would transcend any legitimate claim of work preservation. The service provided by Mahon and Wilson, though involved with exports, is an incident of traditional shore-side services, conventionally available through inland warehouses, which is not an essential preliminary maritime service. The ILA's claim for this work by virtue of the Rules on Containers is no more in support of fairly claimable work than in the case of importation of FSL cargo for holding and distribution by a full service public warehouse located within the port area. (Pet. App. pg. 144a)

Thus the warehouse must continue to stuff and strip containers as a necessary incidence to its traditional functions. Warehouses did so prior to containerization and continue to do so with containerization.

Stuffing and stripping work was not created for warehouses by containerization. The ALJ correctly recognized that a distinction should be drawn between stuffing and stripping work that was created by containerization, and stuffing and stripping which was merely a continuation of work previously done and was a necessary, integral concomitant of such work. The traditional work of public warehousemen falls within the category of work that should not be subject to acquisition under the Rules.

The Rules as applied to such traditional warehouse functions constitute unlawful work acquisition. While the Board agreed with that conclusion it reached such a result by a somewhat different path. It concluded that since containerization had eliminated the stuffing and stripping which longshoremen would otherwise have provided, the Rules attempt to regain this unnecessary, duplicative work was unlawful work acquisition.

There is no essential dicotomy between the decisions of the ALJ and the Board. Both correctly recognized that stuffing and stripping by warehousemen in furtherance of their traditional

functions was work that predated containerization. Both correctly apply the analysis suggested by this Court.

This Court recognized that a proper analysis must take into account all of the circumstances involved including the nature of the work both before and after the innovation.

> "... more complex cases will require a broader view, taking into account the transformation of several interrelated industries or types of work; this (containerization) is such a case." *NLRB* v. *Longshoremen,* 447 US 490, (1980).

The decision of the ALJ and the Board clearly recognized the interrelated nature of the distribution industry. Containerization altered or transformed the nature of the tasks involved in the distribution chain. Intermediate stuffing and stripping of containers became unnecessary on shipments moving through public warehouses for traditional warehousing purposes. The Rules to the extent they were directed to work taken by container stations and similar entities created by containerization were found to be valid work preservation. To the extent the Rules reached beyond into the traditional work of public warehouses they were invalid work acquisition.

This analysis is based on evidence of record. It is consistent with the balancing recognized by this Court. The Board's ultimate conclusion with respect to the warehouseman's functions should be affirmed.

The Fourth Circuit refused to accept the complex analysis made by the Board. Instead the Court reasoned that stuffing and stripping was sui generis. If the Rules were valid in one respect they were valid in all respects. That approach is not consistent with the analysis of this Court.

The recognition by the Board of the complex interrelationships among the necessarily interdependent functions in the distribution system supports the imposition of limits on the reach of the Rules. To the extent they reach into the traditional public warehouse functions they go too far. They become work acquisition and extend beyond a reasonably drawn line.

CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit should be reversed insofar as it finds the Rules lawful with respect to work traditionally done by public warehouses.

Respectfully submitted,

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(4)

No. 84-861

In the Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS AMERICAN TRUCKING ASSOCIATIONS, INC. AND TIDEWATER MOTOR TRUCK ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the National Labor Relations Board correctly concluded that the collectively bargained rules governing the use of containers in the shipping industry, in their application to certain widespread practices of motor carriers and warehouses, lack a valid work preservation objective and therefore constitute unlawful secondary activity under Sections 8(b)(4)(B) and 8(e) of the National Labor Relations Act, 29 U.S.C. §§158(b)(4)(B) and 158(e).

PARTIES TO THE PROCEEDING

The proceeding in the court whose judgment is sought to be reviewed encompassed four consolidated cases seeking review or enforcement of decisions of the National Labor Relations Board. In addition to the National Labor Relations Board, the following parties appeared in one or more of the four consolidated cases: American Trucking Associations, Inc.;[1] Tidewater Motor Truck Association;[2] American Warehousemen's Association; International Association of NVOCCs; Houff Transfer, Inc.; International Brotherhood of Teamsters; International Longshoremen's Association, AFL-CIO; ILA Hampton Roads District Council; ILA Atlantic Coast District Council; ILA District Council, Baltimore, Maryland; ILA Locals 333, 846, 862, 921, 953, 970, 1248, 1355, 1416, 1416-A, 1429, 1458, 1526, 1526-A, 1624, 1680, 1736, 1783, 1784, 1819, 1840, 1922, and 1970, AFL-CIO; New York Shipping Association; Council of North Atlantic Shipping Associations; Hampton Roads Shipping Association; Southeast Florida Employers Port Association; Coordinated Caribbean Transport, Inc.; Chester, Blackburn & Roder, Inc.; Eagle, Inc.; Eller & Company, Inc.; Harrington & Company, Inc.; Strachen Shipping Company; Marine Terminals, Inc.; Florida Custom Brokers and Forwarders Association, Inc.; Twin Express, Inc.; National Container Express, Inc.; and San Juan Freight Forwarders, Inc.

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1. ATA, a non-profit District of Columbia corporation, is a national federation of 51 independent and autonomous "state trucking associations," each representing all classes and types of trucking operations. Full membership in ATA is obtained by companies and individuals through affiliation with the state associations. Virtually every major trucking company in the United States is an affiliate of ATA.

2. TMTA is an unincorporated association consisting of seventeen member companies, most of whom are affiliated with ATA.

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NATIONAL LABOR RELATIONS BOARD,
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INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS AMERICAN TRUCKING ASSOCIATIONS, INC. AND TIDEWATER MOTOR TRUCK ASSOCIATION IN SUPPORT OF PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a)[3] is reported at 734 F.2d 966. The decision and order of the National Labor Relations Board (Pet. App. 35a-64a) and the decision of the Administrative Law Judge (Pet. App. 65a-258a) are reported at 266 NLRB 230.

3. "Pet. App." refers to the appendix filed jointly by the petitioners in Nos. 84-677, 84-684, 84-691, and 84-696. "Jt. App." refers to the appendix filed in No. 84-861. "C.A. App." refers to the appendix filed in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1984. Pet. App. 1a-30a. A petition for rehearing was denied on July 31, 1984. Pet. App. 31a-34a. The petition for a writ of certiorari was timely filed on November 28, 1984, and was granted on January 21, 1985. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(b) of the National Labor Relations Act ("Act"), 29 U.S.C. §158(b), provides in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> * * *
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce where in either case an object thereof is:
>
> * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . .

Section 8(e) of the Act, 29 U.S.C. §158(e), provides in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void . . .

STATEMENT OF THE CASE

A. The Rules on Containers

This case concerns the legality of the Rules on Containers ("Rules") negotiated by the International Longshoremen's Association ("ILA") and various ocean vessel operating common carriers ("VOCCs" or "steamship lines") and their associations. The Rules are a response to a technological change in the freight transportation industry customarily referred to as "containerization." A large, reusable metal container that can be moved on and off an ocean vessel unopened and transferred between different transportation modes is the primary hardware of the new technology.[4] Jt. App. 190.

4. Containers range in length from 20 to 40 feet and are capable of holding upwards of 30,000 pounds of freight. They

(Continued on following page)

Four distinct segments of the freight transportation industry handle containers. Each serves a different basic transportation function. VOCCs use containers in connection with ships to unitize cargo for loading, transport and unloading. VOCCs employ ILA represented labor to perform this work.[5] Consolidators, including NVOCCs, use containers to combine the goods of various shippers into a single shipment at their own off-pier terminals and deliver the container to the pier.[6] *ILA I*, 447 U.S. at 496 n.8.

Footnote continued—

can be placed on truck chassis or on railroad flatbed cars and transported unopened to and from the ocean pier, and they fit into the holds of specially designed vessels known as containerships. *NLRB v. International Longshoremen's Assn.* ("*ILA I*"), 447 U.S. 490, 494 (1980).

5. ATA argued unsuccessfully to the Administrative Law Judge ("ALJ") and the Board that the Rules had a secondary objective because they were negotiated between VOCCs and the ILA as representative of the bargaining unit of "longshoremen," who load and unload cargo to and from the ships, but are for the primary purpose of preserving work for "short-shoremen," employed by terminal and stevedoring companies and represented by the ILA in separate bargaining units, at least in the Port of Hampton Roads, Virginia. ATA Brief to the Bd. at 15-17, 50-54. It is the short-shoremen who segregate, mark, unitize, and otherwise handle the cargo in the terminal areas, load and unload the cargo to and from the containers, and move the containers to and from the locus of the ship's tackle where the containers are then handled by the longshoremen employed by stevedoring companies to load and unload ships. Only longshoremen are covered by the Rules on Containers agreement. Only by blurring the separate employment relationships of maritime employers and the work traditions of their work forces was the ALJ able to ignore the clear secondary objective of the Rules to protect the work in sister ILA locals not covered by the Rules. Pet. App. 106a n.29. Therefore, all maritime employees represented by the ILA will be referred to hereinafter as "longshoremen."

6. Consolidators may or may not own and operate their own motor trucks. Some contract with motor carriers for the actual transportation of the goods. A consolidator who acts as a carrier by arranging and being responsible by a single bill of lading for the transportation of goods from shipper to consignee or from an inland warehouse across the sea to an inland destination location is called a non-vessel operating common carrier by water ("NVOCC"). *ILA I*, 447 U.S. at 496 n.8.

Motor carriers use containers on truck chassis to transport containers filled with export cargo from shippers to the pier and to transport containers filled with import cargo from the pier to consignees. *ILA I*, 447 U.S. at 500-501. Warehouses unload import cargo from containers for storage and containerize for export previously stored cargo.[7] Consolidators, motor carriers and warehouses employ labor represented by the Teamster's Union and unrepresented labor to handle containers. Jt. App. 6, 15-16, 49, 63, 89-90, 127.

The loading of containers, by whomever performed, is known as "stuffing"; the unloading of containers is known as "stripping." *ILA I*, 447 U.S. at 497; Pet. App. 84a. A container that contains export cargo belonging to more than one shipper or import cargo destined for more than one consignee is termed a "consolidated load," or a "less-than-container load" ("LCL") container. A container that contains export cargo from only one shipper or import cargo destined for only one consignee is known as a "full shippers load" ("FSL") container. *ILA I*, 447 U.S. at 497.

The growth of containerization reduced the traditional loading and unloading work performed by both longshoremen and truckers at the seaport terminal. Containers eliminated the need for piece-by-piece (or "break-bulk") cargo handling between the ship and the truck. *ILA I*, 447 U.S. at 495-496; Pet. App. 46a. Export containers were stuffed before they reached the pier; import containers were stripped after they left the pier. With respect to containerized cargo, it remained only for longshoremen to take

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7. Containers are also used by the actual or "beneficial" owners of goods to send goods from or receive goods at their place of business. Beneficial owners may contract with VOCCs, consolidators, motor carriers and/or warehousemen for services in connection with the transportation of import or export containers.

the containers on and off the vessel, and for truckers to drive away with the containers. Pet. App. 46a-47a; Jt. App. 154; C.A. App. 602, 635-36, 640-42, 677.

Seeking to replace the work lost by ILA members because of containerization, the ILA and the Council of North Atlantic Shipping Associations ("CONASA"), an organization of shipping associations whose members are steamship lines and stevedoring companies operating out of North Atlantic ports, the New York Shipping Association (an association of VOCCs operating out of the Port of New York), and other Respondent maritime associations and employers have negotiated a series of collective bargaining agreements incorporating the Rules. These agreements have been adopted by the ILA and multi-employer associations in every major Atlantic and Gulf Port. Pet. App. 47a, 96a-97a & n.23; Jt. App. 200; C.A. App. 1157, 1189.

The Rules require that, with one relevant exception, all containers, whether LCL or FSL, which would otherwise be stuffed or stripped within 50 miles of a port by employees other than those of the beneficial owner of the cargo, must be stuffed or stripped by ILA-represented longshoremen at the seaport terminals. The exception is for FSL import containers where the cargo is to be warehoused at a bona fide warehouse for a minimum of 30 days. Pet. App. 103a, 232a-233a.

The Rules forbid the signatory employers from supplying containers to any person or business entity operating in violation of the Rules. The Rules also require any VOCC, which fails to comply with the Rules and releases for handling a container that should have been stuffed or stripped on the pier by longshoremen, to pay liquidated damages of $1,000 per container into the container royalty fund. Pet. App. 11a, 47a, 103a, 228a-229a. The ILA has repeatedly attempted to enforce the Rules through penalties, threats and inducements. Pet. App. 179a-182a. To protect themselves from ILA fines the steamship lines have refused to permit the release of empty or full containers to motor carriers, consolidators, and warehouses when it is believed that they would be stuffed or stripped in violation of the Rules.

B. ILA I

In *ILA I,* this Court remanded a Board holding that the Rules unlawfully sought work always performed off-pier, because the Board had improperly relied upon the lack of ILA off-pier work traditions. *ILA I,* 447 U.S. at 506-08. The Court directed the Board to "evaluate the relationship between traditional longshore work and the work which the Rules attempt to assign to ILA members." *Id.* at 509. The Court explained that the legality of the Rules turned, as an initial matter, "on whether the historical and functional relationship between this retained work and traditional longshore work can support the conclusion that the objective of the agreement was work preservation rather than the satisfaction of union goals elsewhere." *Id.* at 510. The Court noted that "the result will depend on how closely the parties have tailored their agreement to the objective of preserving the essence of the traditional work patterns." *Id.* at 510 n.24.

The Court recognized that in the instant case, technological innovation had "changed the method of doing the work, instead of merely shifting the same work to a different location." *Id.* at 505. Where the method of doing the work has changed, the Court cautioned that a union is entitled to preserve only its *"traditional work patterns."* *Id.* at 506 (emphasis added).

The Court declined to apply this "historical and functional relationship" test in the first instance to the facts before it, on the ground that the Board had not "had an opportunity to consider these questions in relation to a proper understanding of the work at issue." *Id.* at 511. Rather, the Court directed the Board to determine whether the "stuffing and stripping reserved for the ILA by the Rules is functionally equivalent to their former work of handling break-bulk cargo at the pier," or whether, "containerization has worked such fundamental changes in the industry that the work formerly done at the pier by both longshoremen and employees of motor carriers has been completely eliminated." *Id.* at 510-11.

This Court disclaimed in *ILA I* any intention to either "decide today the proper definition of the work in controversy . . . [or] hold that the Rules are a lawful work preservation agreement." *Id.* at 511 n.26. Rather, the Court emphasized that "the question whether the Rules may be sustained under a proper understanding of the work preservation doctrine must be answered first by the Board on remand." *Id.*

C. Findings of the Administrative Law Judge

On remand, the Board consolidated the two cases reviewed in *ILA I* with seven other proceedings concerning the Rules. Prior evidentiary records were significantly supplemented.

Upon consideration of the evidence in light of the mandate of this Court, the ALJ rejected ATA's contention that containerization has worked such fundamental changes in the freight transportation process that container work dictated by customers to be performed away from the piers was not functionally related to traditional ILA work. Pet. App. 114a-123a.[8] The ALJ found the Rules had a general work preservation objective, and that all of the container work performed by NVOCCs and other pure consolidators, as well as some of the container work of motor carriers and warehousemen, could be preserved by the Rules for the benefit of the longshoremen.

Although the ALJ did not find that containerization had so fundamentally changed the transportation industry that all of the new work was functionally unrelated to traditional ILA work, he did find that certain motor carrier and specialty warehouse container work was functionally unrelated to traditional ILA work, and therefore, was beyond the lawful reach of the Rules. The ALJ turned his decision on the presence or absence of a functional relationship between traditional ILA work and the various categories of work sought by the Rules.

1. Findings as to consolidators

The ALJ found that the Rules were lawful as applied to consolidators, including NVOCCs, because they are almost exclusively engaged in the handling of LCL cargo on behalf of small shippers. Pet. App. 125a. The ALJ found that this work served the same function in the course of ocean transportation of cargo as the work historically performed by ILA members. Pet. App. 123a-129a. The ALJ stated that "the NVOCCs and steamship companies are competitors, and the NVOCCs' stuffing and stripping of containers owned or leased by the former is pursuant to a reallocation of work from the piers to offshore facilities created virtually in its entirety by the development of containerization." Pet. App. 129a. The propriety of this find-

8. This issue has been presented for review by ATA's Petition for Certiorari, Case No. 84-696, still pending before the Court.

ing apparently is not within the scope of the Court's grant of certiorari herein.[9]

2. Findings as to motor carriers

The ALJ found that the Rules could *not* lawfully be applied to certain practices of motor carriers, because these practices were neither historically nor functionally related to the traditional work of ILA members.

As regards the motor carriers' handling of import cargo, the ALJ found that prior to containerization motor carriers picked up break-bulk cargo at a seaport terminal and delivered the cargo to the motor carrier's freight station where it was unloaded and then reloaded into over-the-road equipment for delivery to one or more consignees. The ALJ further found that this practice of off-loading, sorting, segregating and reloading by destination was "a practice which possessed no exclusive relationship to marine trade," noting that "cargo shipped purely on an interstate or continental basis by motor truck . . . is subject to the same handling at terminals and truck stations." Pet. App. 132a-133a.

After containerization, motor carriers began to pick up containers from the pier and reload the containers at the motor carriers' freight stations into over-the-road equipment, a practice known as "short-stopping."[10] The ALJ

9. ATA concedes, but only for the purposes of considering the issue herein, that the ALJ appropriately awarded some of the work sought by the Rules to longshoremen. ATA's Petition for Certiorari is still pending as to this work. Case No. 84-696.

10. The ALJ used the term "short-stopping" to denote only the stripping and restuffing of *import* containers. Pet. App. 133a-135a. In *ILA I*, the Court used the term "short-stopping" to denote the stripping and restuffing of either import or export containers. *ILA I*, 447 U.S. at 501. This brief uses the term in its latter, broader definition.

found that the short-stopping of import containers by motor carriers was simply a continuation of traditional motor carrier work which bore no historical or functional relationship to the traditional work of ILA members:

> [I]t appears that the practice of short-stopping is rooted in traditional motor carrier transport cargo handling procedure, which is performed by motor carriers for their own benefit and convenience. To the extent that containers are handled *for such purposes*, and not under direction or for the benefit of shippers, consignees or their agents, *short-stopping has no relevance to the marine leg of the intermodal network*. Although skills utilized therein are indistinct from those of deepsea longshoremen in the performance of their traditional duties, *it is work assumed for a different purpose, and in a different segment of the transportation industry*. Short-stopping is simply a carrier oriented, as distinguished from consumer oriented service, and as such neither competes with marine cargo handling nor amounts to a subterfuge to oust longshoremen of their traditional work. To this extent, upon delivery of a container to a motor carrier, the seaborne leg ends, the *container becomes the substitute for the trailer or van*, and work beyond this interface was neither created by containerization nor does it make inroads on that traditionally made available to deepsea ILA labor by marine operators.

Pet. App. 134a-135a (footnote omitted) (emphasis added).[11]

11. The ALJ held that motor carriers could short-stop both FSL and LCL containers for their own benefit and convenience, but the Rules could be enforced to prevent motor carriers from consolidating and deconsolidating LCL containers for the benefit of customers, because that would "encourage a diversion of work to combined trucking/warehouse operations, or for that matter to truck stations, to evade the legitimate reach of the Rules and to undermine traditional ILA work jurisdiction." Pet. App. 139a n.55, 137a n.54, 133a, 132a.

As regards motor carriers' handling of FSL and non-consolidated LCL export containers,[12] the ALJ found:

> [M]otor carriers also have stuffed FSL containers for export within the port area. For example, since containerization, certain interstate truckers have stuffed FSL containers at their port area truck stations. Thus, in order to avoid inconvenience attendant in the delivery of empty containers to shippers so as to enable stuffing by the customers' employees and immediate transport to the pier, such cargo will be hauled in trailer loads to the truck station, where it will be stuffed into FSL loads and delivered to the pier. Evidence also exists that at least one carrier stuffed all export FSL containers at its port area truck station because its tractors were incompatible with and were damaged by containers. . . . [*T*]*he stuffing of outbound FSL containers by entities acting purely in the capacity of motor carriers, not as a direct service to customers, but to facilitate their own transport needs, would seem incidental to the movement of surface freight.* As such, the FSL container handling would fall within the framework of traditional motor carrier practice, relative to the preparation of freight for delivery from port trucking station to the piers, as well as the conversion of cargo from over-the-road to local type equipment. If this work is not offered to the public as an available service, or performed under an ocean bill of lading, or on behalf of an NVOCC, ocean freight forwarder or anyone else engaged in services offered by employers of ILA labor, *it bears an insufficient relationship to work performed within the marine leg of the transport system, to represent work fairly claimable by deepsea ILA labor.* As is [t]rue of "short-

12. See n.10 *supra.*

> stopping", application of the Rules in this context is viewed as an attempt to offset job losses on the piers by disrupting inland work patterns not involving work lost by longshoremen in consequence of containerization.

Pet. App. 136a-137a (footnotes omitted) (emphasis added).

3. Findings as to warehousemen

The ALJ held that the Rules could lawfully be enforced to prevent warehousemen from (a) consolidating and deconsolidating LCL containers, (b) stripping and stuffing of LCL containers not consolidated or deconsolidated by warehousemen, and (c) stripping and stuffing FSL containers when such stripping and stuffing is performed for the sole purpose of avoiding this work at the piers. Pet. App. 137a n.54, 139a n.55, 141a, 144a, 145a n.59. The ALJ reasoned that:

> Since the distinction between container handling which is and which is not rightfully claimable by ILA, insofar as warehousing is concerned, to a great extent is a function of time, the 30-day storage rule is not wholly inapposite to ILA's legitimate claim *insofar as it extends to cargo lots no part of which is received by a warehouse for indefinite holding.* In this posture, the 30-day storage rule seems a logical basis for *distinguishing the historic warehouse function from that which is merely an inland container station established to erode ILA historical work jurisdiction.*

Pet. App. 142a (emphasis added).

However, the ALJ found that the Rules' 30-day storage requirement cut too deeply into traditional warehouse

practices. Pet. App. 141a. As regards the handling by warehouses of *import* cargo, the ALJ found that prior to containerization import cargo would be delivered to the warehouse by a trucker, where the trailer or truck would then be unloaded, with the cargo sorted, segregated, palletized and placed in a designated storage area, until the consignee instructed the warehouse to distribute or deliver the goods. Pet. App. 138a. The ALJ further found that after containerization warehousing practices did not change; where previously warehouse employees stripped truck trailers, they now perform the same work upon containers. Pet. App. 138a.

Thus, the ALJ found that the Rules could not lawfully be applied to the stuffing and stripping of *FSL import* containers by warehouse employees where such work was done in connection with the traditional storage function of warehouses:

> The container handling services afforded by warehousemen as outlined above are and have been integrated into a surface system of transportation, which was not created by containerization, *and poses no threat to historic work jurisdiction of ILA.* As was true of motor carriers, the Rules on Containers as applied to such historic aspects of off pier work constitutes a work acquisition arrangement contemplating seizure of jobs on behalf of ILA to obtain traditional work of others to *compensate for their own unrelated job losses.* . . . [C]onsignees of imported goods often utilize inland warehouses to inventory imported goods, as against flexible and unforeseeable market demand. Such practices permit immediate delivery and avoid the delays encountered through a shipment from point of origin on sale, or customer order, method of doing business. *It is an integral part of the surface distribution system not generally, duplicated at portside marine operations, and container handling in conjunction therewith, is akin to the historic unloading of trailers at said site.* Application of the ILA's 30-day storage limitation so as to preclude a consignee's access to warehoused goods *in container-size lots* is often incompatible with the consignee's need to meet consumer demand, and enforcement of that restriction in such a context serves as an impediment to *inland work practices which bear no relationship to services customarily or historically available at pier side.*

Pet. App. 139a, 141a (emphasis added).

The ALJ held that, to the extent that warehouses stuffed or stripped *FSL export* containers without performing any specialized warehouse services, the work of the warehouses was historically and functionally related to traditional ILA work:

> Where no special services peculiar to the surface warehousing industry are provided or performed in connection with such activity, the work of stuffing the container could as easily be performed at pier side with ILA deepsea labor. The ban of the Rules on such a practice effectively restores for deepsea longshoremen the work they performed with respect to the cargo prior to containerization when shippers of large quantities of goods delivered full trailer loads directly to the piers.

Pet. App. 144a.

However, the ALJ reached a different conclusion where the handling by warehouses of *FSL export* cargo included the performance of specialized warehouse ser-

vices. Where this occurred he treated this work the same as FSL import container work. The ALJ found with respect to one example of warehouse work:

> The service provided by [a warehouseman] . . . , though involved with exports, is an incident of traditional shore-side services, conventionally available through inland warehouses, which *is not an essential preliminary maritime service*. The ILA's claim for this work by virtue of the Rules on Containers is no more in support of fairly claimable work than in the case of importation of FSL cargo for holding and distribution by a full service public warehouse located within the port area.

Pet. App. 144a n.58 (emphasis added). Similarly, the ALJ held that the stuffing of FSL containers for export by another warehouseman "was but an incident of general storage, picking, and consolidation, pursuant to an ongoing relationship between warehouse and single shipper, which together represent an integrated inland service, distinct from the temporary storage provided at marine terminal warehouses." Pet. App. 182a.

The ALJ recognized that the application of the Rules to warehouse work could not "be branded with overarching legality or illegality on a facial basis," and concluded that "the legitimacy of the Rules as they apply to warehousemen handling FSL containers must be resolved on a case-by-case basis."[13] Pet. App. 145a.

13. The various traditional warehouse practices found by the ALJ to be beyond the lawful reach of the Rules are hereinafter referred to as "specialty warehouse work."

D. The Board's Decision and Order

The Board affirmed the rulings, findings, and conclusions of the ALJ and adopted his recommended Order. Pet. App. 42a. However, the Board modified the ALJ's rationale for concluding that the Rules were unlawful as applied to short-stopping and traditional warehousing functions in this respect:

> The Administrative Law Judge also found that no new work was created by containerization for trucking and warehousing employees. Further, in contrast to consolidation, no work was diverted away from the pier to the truckers and warehouses as a result of containerization, at least as to those short-stopping and traditional warehousing services involved where he found violations. Rather, after containerization, some of the traditional loading and unloading work of the longshoremen, which had historically been duplicated by trucking and warehousing employees, essentially was eliminated. While we agree with the Administrative Law Judge's conclusion that the ILA had an unlawful work acquisition objective in claiming this loading and unloading work which is now done solely by trucking and warehousing employees in connection with short-stopping and traditional warehousing services, we do not agree with his reliance on the fact that the work now done by the truckers and warehouses is work which was not created by containerization. Instead, we point to the fact that, because of the efficiency of the new technology, the duplicative work of the longshoremen, in handling cargo which is then rehandled by truckers and warehouses, no longer exists as a step in the cargo-handling process.

Pet. App. 59a.

E. The Decision of the Court of Appeals

The court of appeals held that "the Rules are valid in all respects." Pet. App. 4a. It accordingly sustained the Board's Order insofar as it upheld the lawfulness of the Rules, but denied enforcement of the Order insofar as it held unlawful the Rules' application to short-stopping and traditional warehousing practices.

The court of appeals proceeded under the misapprehension that the ALJ had found the work in dispute to be historically and functionally related to traditional ILA work, and held that the Board would have committed error in finding that any of the work sought by the Rules was not historically and functionally related to traditional ILA work. Pet. App. 25a. Yet nowhere in his decision did the ALJ find that the new work of loading and unloading containers was functionally related to traditional ILA work patterns.[14]

Ignoring the detailed analysis of traditional work patterns developed by the ALJ, the court justified its holding with the simplistic observation that:

> Traditionally, longshoremen loaded cargo piece by piece into the hold of the ship and unloaded it piece by piece from the hold. The Rules grant them the right in certain instances to load cargo piece by piece into containers and unload it piece by piece from containers. In short, containerization has simply changed the locus of the work, moving the operation shoreward.

Pet. App. 25a.

14. The closest the ALJ came to such a holding was his statement that "the work in controversy herein, was performed historically at the piers by deepsea ILA longshoremen, *and elsewhere by either truckers, warehousemen, or consolidators, at inland points;*" but, he also found "[t]here is no *inseparable* integration of these tasks with other labor functions [either on or off the pier] or technology." Pet. App. 119a (emphasis added). The Board has sought to bolster the ALJ's validation of the Rules in general by purporting to "agree with the Administrative Law Judge's finding that the work of loading and unloading containers claimed by the Rules is functionally related to the traditional loading and unloading work of the longshoremen." Pet. App. 58a-59a. However, the Board did not cite any language by the ALJ finding such a "functional relationship."

Thus, the court held that the Board erred as a matter of law when it concluded that, because the Rules as applied to short-stopping and traditional warehousing practices "sought to preserve for the longshoremen work that had been rendered superfluous by the change in technology and not work that had been diverted to others," the Rules violated the Act in those applications. Pet. App. 27a. The court acknowledged that containerization had not altered the motor carriers' work and had made the longshoremen's work unnecessary:

> Prior to containerization, both the longshoremen and the truckers handled the break-bulk cargo as it moved from the ship to the consignee. . . With containerization, the off-pier work of the short-stopping truckers remains essentially unchanged except that they unload cargo from containers instead of from motor trucks. And with containerization, of course, the work formerly performed by the longshoremen has been rendered unnecessary because the container can be fastened to the chassis of a truck and transported intact to the trucking terminal or freight station.

Pet. App. 27a.

Nonetheless, the court ruled that the Board's conclusion that the application of the Rules to short-stopping does not have a valid work preservation objective was erroneous for the following reason:

> [T]he Board conspicuously failed to ground this conclusion . . . in the only finding of fact that might support it: that the Rules, in preserving for ILA members the right to do this initial loading and unloading, somehow deprive the truckers and warehousemen of *their* off-pier work by transferring all or some of it to longshoremen at the pier. Put another way, the Board hung the "work acquisition" tag on the Rules in these two instances without a finding that the longshoremen acquired anything. . . [O]ne cannot possibly maintain that the stripping of import containers at the pier would in any way prevent the identical off-pier work. To repeat, truckers and warehousemen do precisely what they did before the change in technology; the longshoremen have acquired none of that work. Although the longshoremen's work in this process may well duplicate the off-pier work of truckers and warehousemen, calling this set of circumstances "work acquisition" strikes us as particularly inappropriate.

Pet. App. 27a-28a. The court asserted that "the Board made the identical error of law with regard to both short-stopping and warehousing." Pet. App. 27a n.8.

SUMMARY OF ARGUMENT

The Board correctly concluded that the Rules, as applied to short-stopping by motor carriers and to specialty warehouse work, lack a valid work preservation objective and therefore constitute unlawful secondary activity under Sections 8(b)(4)(B) and 8(e) of the Act, 29 U.S.C. §158(b)(4)(B) and 158(e).

In *ILA I,* this Court directed the Board to determine whether a historical and functional relationship exists between traditional longshore work and the work which the Rules attempt to assign to ILA members. *ILA I,* 447 U.S. at 509-10. The Court held that the Rules could be found lawful only to the extent that they preserve the essence of traditional ILA work patterns. *Id.* at 510 n.24. In directing the Board's attention to the function of traditional ILA work and the functions of the work claimed by the Rules, this Court intended the Board to analyze the purpose for which the various types of work are performed and the role of that work within the freight transportation system as a whole.

The Board properly applied the analysis mandated by this Court in finding that the short-stopping and specialty warehouse work sought by the Rules is not historically or functionally related to traditional ILA work. Substantial evidence supports the Board's findings. Undisputed evidence establishes that both before and after containerization the function of longshoremen has been to load and unload cargo of whatever size to and from ships and handle it between the ships and the trucks. In contrast, the function of short-stopping by motor carriers is to permit safer and more economical transport of cargo between the piers and inland points. Longshoremen have

never handled cargo or stripped and stuffed containers in furtherance of this motor carrier function. Similarly, the function of specialty warehouse work is to perform special packing and distribution services in connection with the storage of goods for later release pursuant to the instructions of the shipper or consignee. The facilitation of intermediate storage and surface distribution of goods has never been within the function or purpose of longshore work.

The court of appeals erroneously believed that the Board found all the work claimed by the Rules to be historically and functionally related to traditional ILA work. In fact, the Board unambiguously adopted the findings and conclusions of the ALJ, who clearly found that short-stopping and specialty warehouse work was not historically and functionally related to traditional ILA work. Although the Board purported to modify some of the ALJ's rationale, its holding that the Rules are unlawful as applied to short-stopping and specialty warehouse work is ultimately grounded upon the ALJ's findings that pre-containerization longshore work functions had never included the functions served by short-stopping and specialty warehouse work.

The court of appeals ignored the ALJ's careful analysis of the functions served by the various types of work claimed by the Rules and held that the Board was compelled to find a historical and functional relationship between traditional ILA work and all the work claimed by the Rules simply because both types of work involve the loading and unloading of cargo piece by piece. In equating a physical resemblance in job skills or duties with a historical and functional relationship between traditional longshore work and the work claimed by the Rules, the court of appeals misapplied this Court's stan-

dard. In *ILA I,* this Court recognized that both traditional ILA work and modern container work involved the loading and unloading of cargo piece by piece, but this Court rejected the argument now adopted by the court of appeals that the container is simply the hold of the ship moved shoreward.

The court of appeals further erred in holding that the Rules must be held lawful absent a finding that the Rules deprive motor carriers and warehousemen of work. In *ILA I,* this Court held that the two relevant tests of legality were first, whether the work in dispute was historically and functionally related to traditional ILA work, and second, whether the VOCCs possess the right to control the disputed work. By requiring a finding that motor carriers and warehousemen have lost work, the court of appeals has held that the Rules may claim work even though it is not historically and functionally related to traditional ILA work.

The court of appeals' reliance on its assumption that motor carriers and warehousemen have not lost work as a result of the Rules is factually as well as legally unsound. Substantial evidence establishes that motor carriers and warehousemen within 50 miles of the piers have lost and will continue to lose work due to the enforcement of the Rules, whether or not any of the disputed work returns to the piers.

Since the Board properly applied the test mandated by this Court in *ILA I,* the Board's Order as to short-stopping and specialty warehouse work should be enforced.

ARGUMENT

A. The Proper Perspective For The Work Preservation Analysis.

The Court recognized in *ILA I* that "technological innovation may *change the method* of doing the work, instead of merely shifting the same work to a different location." *ILA I,* 447 U.S. at 505 (emphasis added). The Court instructed:

> Identification of the work at issue in a complex case of technological displacement requires a careful analysis of the *traditional work patterns* that the parties are allegedly seeking to preserve, *and of how the agreement seeks to accomplish that result* under the changed circumstances created by the technological advance. The analysis must take into account "all the surrounding circumstances," . . . *including the nature of the work both before and after the innovation.*

Id. at 507 (emphasis added). The "work at issue" in this case was defined by the Board, with the court of appeals' approval, as:

> [T]he initial loading and unloading of cargo within 50 miles of a port into and out of containers owned or leased by shipping lines having a collective-bargaining relationship with the ILA.

Pet. App. 57a; 22a.

The Board was then required to measure the work in dispute against the "traditional work patterns" of the ILA, "taking into account the transformation of several interrelated industries or types of work." *ILA I,* 447 U.S. at

507. The Court's instructions did not license an award of work associated with containers which was outside of the traditional work patterns of longshoremen no matter how many jobs were eliminated by the new technology.

The uniqueness and difficulty of this case lies in the fact that the new technology has unquestionably eliminated break bulk cargo handling work by longshoremen and truckers on the piers. *ILA I,* 447 U.S. at 495. With respect to this work preservation model, the disputed break bulk handling work flows through the bargaining unit in the container pipeline and never returns in any form.[15] Just how much of the cargo handling work attendant to the new container technology should be siphoned away from the container pipeline and considered "related" to or a "part" of the traditional work function of longshoremen depends in large part on the definition of their function before containerization.

ATA believes the proper division of work functions between the transportation modes is at the historic interface where ocean borne cargo was transferred between longshoremen and truckers, because the traditional function of longshoremen has been to unload cargo of whatever size and handle it between the ships and the trucks. This Court, the ALJ, and all Respondents agreed that this was precisely the traditional function of longshoremen. *ILA I,* 447 U.S. at 510; Pet. App. 105a; Shipping Group's

15. *National Woodwork Mfrs. Assn. v. NLRB,* 386 U.S. 612 (1967), involved a model of work preservation where the disputed work was sent out of the unit for processing with the new technology and then brought back into the unit for further work. The court of appeals failed to recognize the difference in the *National Woodwork* model and the *ILA I* model, which led it to an improper reliance on the concept of "work acquisition" discussed in *National Woodwork,* 386 U.S. at 630-31.

Brief to the Fourth Circuit ("SGB 4 C.A.") at 6. Although the ALJ and the Board believed that the ILA was entitled to claim all of the work performed by consolidators, and much of the work performed by warehousemen and motor carriers, they found the short-stopping and specialty warehouse work to be unrelated to the traditional functions of the ILA.

The ALJ revealed the lack of any relationship between the longshoremen's traditional function and the function of the short-stopping and specialty warehouse work by considering the *purposes* for which various types of container work are performed.[16] Pet. App. 112a, 134a, 136a, 119a, 123a. Where the purpose is to avoid cargo handling by longshoremen, which but for development of the container technology might have been performed at the piers, the new container work is considered to be sufficiently related to traditional longshore work to find the Rules lawful. But, where the purpose is to serve the convenience of motor carriers and warehousemen, rather than shippers for whom VOCCs competed for business, the objective of the Rules was considered to be other than work preservation, because the function of traditional ILA work has never been to serve the convenience of truckers or traditional warehousemen.

16. *The Random House College Dictionary* (Rev. Ed. 1980) (def. 1) defines "function" as "the purpose for which something is designed or exists; role." *The Merriam-Webster Dictionary* (1974) (def. 4) defines "function" as "an action contributing to a larger action; especially, the normal contribution of a bodily part to the economy of the organism." Similarly, *Webster's Ninth New Collegiate Dictionary* (1983) (def. 2) defines "functional" as "used to contribute to the development or maintenance of a larger whole." The Supreme Court clearly used "functional" in this sense of the word when it mandated an evaluation of the historical and functional relationship between traditional ILA work and the work sought by the Rules, "taking into account the transformation of several interrelated industries or types of work." *ILA I*, 447 U.S. at 507.

This Court recognized the possibility that different functions could be served by the use of containers when it rejected "the claim that if the Rules are upheld the union would be able to follow containers around the country and assert the right to stuff and strip them far inland" by noting that "[t]hat work would bear an entirely different *relation* to traditional longshore work, and would require a wholly different analysis."[17] *Id.* at 510 n.24 (emphasis added). Thus, whether "the essence of the traditional work patterns" bears a functional relationship to the work created by the new technology depends upon the purpose of the type of container work in question. The function or purpose of the container does not remain static; its function changes as its use changes. As the ALJ said, "upon delivery of a container to a motor carrier, the seaborne leg ends, [and] the container becomes a substitute for the trailer or van."[18] Pet. App. 135a.

The court of appeals erroneously believed that the Board "divorced itself completely" from the ALJ's conclusion that short-stopping and traditional warehouse work

17. The 50-mile perimeter established by the Rules is predicated on the assumption that all pre- and post-container work performed within the zone was equivalent to ILA traditional work functions. There are no findings of fact to this effect, and there is no substantial evidence in the record that supports such a self-serving presumption.

18. "The usefulness of a container lies precisely in the fact that it may function as an integral part of the hold while it is aboard a vessel, as a trailer when it is transported by truck, and as part of a railroad car when it is carried by rail." *ILA I*, 447 U.S. 510 n.23. "Merit exists in the observation by counsel for ATA-TMTA that containerization produced an equipment change which is 'chameleon-like' as it passes through various segments of the transport industry. . . . Thus, when one considers traditional business practices in the surface transportation industry, it seems only logical that the container, as it passes from marine stage of the journey into the hands of traditional surface conveyance, be treated as the equivalent of the trailer or truckload." Pet. App. 135a n.51.

bore no functional relationship to traditional ILA work. Pet. App. 22a. However, the court of appeals overstated the Board's disagreement with the ALJ's rationale. The only reservation the Board had with the ALJ's rationale was with his emphasis on the fact that short-stopping and traditional warehouse work was not diverted to motor carriers and warehousemen by the container technology. Pet. App. 59a. The Board agreed with the ALJ's conclusion that the purpose of this work was to benefit the off-pier employers rather than their customers. Pet. App. 42a. The Board cited *Carrier Air Conditioning Co. v. NLRB*, 547 F.2d 1178 (2d Cir. 1976), *cert. denied*, 431 U.S. 974 (1977), and *Associated General Contractors of California, Inc. v. NLRB*, 514 F.2d 433 (9th Cir. 1975), "where the creation of a new product entirely eliminated the work which the bargaining unit employees were seeking to preserve in the agreements found to be unlawful," merely as other examples wherein traditional work had been completely eliminated and integrated into a different work function. Pet. App. 59a-60a.

The difference in emphasis between the rationales of the Board and the ALJ is insignificant. Of far greater importance is the fact that the Board did not take issue with or qualify the ALJ's finding that "historically, the unloading and reloading work done by the truckers at local terminals was not done on behalf of shippers, but rather was done for reasons related to surface transportation, such as to combine several smaller truckloads into one larger truckload for delivery to the same geographic destination." Pet. App. 54a. Nor did it disturb the ALJ's finding that

> [S]ome of the short-term and long-term warehousing work claimed under this rule had *never been performed by ILA-represented employees* at the pier, but rather had traditionally been performed only by employees at inland public warehouses, such as the ongoing storage of a manufacturer's goods for distribution on short notice to customers based on future orders and the ongoing storage of a company's purchased inventory for distribution on short notice to its foreign facilities as demand required.

Pet. App. 56a (emphasis added). Thus, the Board's holding is ultimately grounded upon the ALJ's findings that precontainerization longshore work functions had never included the functions served by specialty warehouse work and by short-stopping for motor carrier convenience.

B. The ALJ's Findings As To Short-Stopping And Specialty Warehouse Work Are Supported By Substantial Evidence.

The Board's findings should be sustained on appeal if they are supported by substantial evidence on the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); National Labor Relations Act, Sections 10(e) and 10(f), 29 U.S.C. §160(e), (f).

The brief filed by Respondents with the court of appeals admitted that "the relevant facts are essentially undisputed . . . ALJ thus had no difficulty reaching his findings of fact which were adopted without reservation of the Board." SGB 4 C.A. at 4-5. The maritime group Respondents did not contend in the court of appeals that the ALJ's decision as to short-stopping and specialty warehouse work was not supported by substantial evidence. Instead, they argued that "Judge Harmatz, misapplying the legal principles enunciated in *ILA*, found that the Rules, although lawful on their face, constituted a secondary

work acquisition device when applied to certain trucking and warehousing practices." SGB 4 C.A. at 20. Therefore, assuming that the Board applied the proper legal analysis, the ALJ's conclusions that the Rules may not be enforced as to short-stopping and specialty warehouse work must be upheld because they are supported by substantial evidence on the record as discussed below.

1. Short-stopping by motor carriers

Motor carriers short-stop containers for their own benefit and convenience in the performance of their function as motor carriers. The function of local motor carriers is to pick up and deliver freight in the seaport areas either on behalf of beneficial owners located there or to transport it between the piers and motor carrier freight stations where it can be sorted and loaded onto over-the-road truck trailers for delivery to one or more inland points. Pet App. 132a; Jt. App. 6-7, 25-26, 90-93, 113-115, 127-128, 205-206, 228-230. Before containerization, this cargo usually had to be exchanged between a local cargo truck and an over-the-road truck because of different equipment and different classes of drivers who operate these trucks. Jt. App. 8-9, 14-15, 21, 25-26, 89-90, 112, 128, 130-131.

Motor carriers decide to short-stop containers for the same reasons that previously prompted them to transfer truckloads of break bulk cargo into over-the-road truck trailers. Like trailer loads of break bulk cargo picked up from the pier in the pre-container era, full containers may exceed state highway limitations or be overloaded, unbalanced or otherwise unsuitable for hauling long distances. Jt. App. 9-10, 115-116, 117-118, 129-130, 201, 206-207, 208-210, 212-213, 218, 222, 229-230. Motor carriers may also short-stop containers for economic considerations

related solely to their own operations. It is more economical for motor carriers to load the contents of two or more containers into one 45-foot truck trailer than to haul two containers long distances. Motor carriers avoid maintenance costs and per diem charges on containers by transferring the cargo onto their own trailers. They also avoid the cost of returning the empty containers from a long-haul delivery, because a road trailer can be sent on to some other inland point. Jt. App. 6-7, 9-10, 27-28, 69-70, 92, 98-99, 117-118, 129-131, 207-209, 212, 216-217, 222, 225-226, 229-230. To achieve these goals container stripping and stuffing is performed at the motor carrier's discretion and at his own expense. Jt. App. 91, 113, 117-118, 131. Neither VOCCs nor longshoremen have ever handled cargo or stripped and stuffed containers in furtherance of these motor carrier operating functions.[19]

2. Specialty warehouse work

Many warehouses offer local trucking services. Jt. App. 12-23, 43-62, 94-102. Unlike "pure" motor carriers, however, warehouses have storage capacity. Customers have always had discretion to time the release of cargo from storage whether within or beyond the first 30 days of storage.[20] Like motor carriers, warehousemen

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19. Intermodalism permits shippers and consignees to dictate where and under what conditions containers will be stripped and stuffed. Pure intermodalism cannot always be accomplished. When containers are stripped and reloaded into truck trailers due to motor carrier considerations, the intermodal function of the container has worked to the limit of the advancement of the technology.

20. If a warehousing account is opened, there is a minimum 30 days storage charge regardless of how long the cargo is warehoused. Pet. App. 141a. Until the 1974 edition of the Rules the ILA exempted from the Rules the stripping and stuffing of containers with cargo "discharged at a bona fide public ware-

(Continued on following page)

have always performed unloading, sorting and consolidation work, sometimes at customer discretion, sometimes for their own convenience. Jt. App. 97-98, 101.

Although warehousemen do compete with seaport terminal companies regarding the function of preparing cargo for further sea, road and rail transportation and short-term storage, there are certain specialty warehouse functions which never have been performed by seaport terminal companies. The affidavits of Matthew Mahon, Jr., President of Mahon's Express, a trucker/warehouseman, cogently describe the functions of his company from its formation in 1905 through the attempted enforcement of the Rules in January 1981. Jt. App. 43-62. The ALJ recognized that Mahon's services on behalf of F.W. Woolworth Company, S.S. Kresge Company and other retail chains served transportation and distribution functions never historically within the function of ILA represented employees or their employers. Pet. App. 144a n.58. The ALJ reached the same conclusion with respect to the operations of Wilson Container Co., Inc. Pet. App. 144a n.58, 126a n.46. Other examples include similar operations by trucker/warehousemen Marty's Express Inc. and D. D. Jones Transfer and Warehouse Co., Inc. Jones, Marty's and Mahon actually break down cases of cargo, which have been re-

Footnote continued—

house" in connection with a warehouse account which called for the payment of "normal warehouse storage fees for a minimum period of 30 or more days." Pet. App. 225a-226a. However, beginning with the 1975 edition of the Rules the ILA engrafted upon normal warehousing practice the additional and unnatural condition that the warehouseman "store[s] the cargo for a minimum period of 30 days" as proof of "bona fide public warehouse" work. Pet. App. 232a. The undisputed facts are that a substantial proportion of warehoused cargo historically was forwarded within the 30 day period, even though some of the cargo may be stored for indefinite periods of time, and that requiring storage for 30 days "is often incompatible with the consignee's need to meet customer demand." Pet. App. 138a, 141a; Jt. App. 15, 96, 135.

moved from containers, and deliver to retail outlets individual pieces of merchandise, either immediately or after some indefinite period of storage, upon instructions of their customers. Jt. App. 43-44, 68-69, 71, 96-97.

The advent of modern containers brought no change in these historic warehouse transportation functions. The physical work consisting of loading, unloading, sorting and consolidating cargo and the purpose of this work remained the same; only a change of equipment occurred —the size of the cargo container increased. Jt. App. 53-55, 83-87, 98-99, 134-135. There is simply no evidence that the functions served by short-stopping and specialty warehousing were ever part of traditional longshore functions.

C. The Court Of Appeals Erred In Equating A Physical Resemblance In Job Skills Or Duties With A Historical And Functional Relationship Between Traditional ILA Work And The Work Claimed By The Rules.

After erroneously asserting that the Board had found all of the work sought by the Rules to be historically and functionally related to traditional ILA work, the court of appeals compounded its error by asserting that the Board "could not have concluded otherwise." Pet. App. 25a. The court defended this startling assertion with the observation:

> Traditionally, longshoremen loaded cargo piece by piece into the hold of the ship and unloaded it piece by piece from the hold. The Rules grant them the right in certain instances to load cargo piece by piece into containers and unload it piece by piece from containers. In short, containerization has simply

changed the locus of the work, moving the operation shoreward.

Pet. App. 25a. The court obviously considered a historical and functional relationship between traditional ILA work and the work sought by the Rules to be established merely by virtue of the fact that both types of work require similar job skills or duties, i.e., the loading of cargo "piece by piece." Pet. App. 25a.

The court of appeals' application of the historical and functional relationship test is clearly at odds with this Court's decision in *ILA I*. This Court fully recognized in *ILA I* that "the work of stuffing and stripping containers is similar to work previously done by both longshoremen and truckers." *ILA I*, 447 U.S. at 508. If this Court had shared the view of the court of appeals that this similarity in work duties established a historical and functional relationship between traditional ILA work and all of the work sought by the Rules, there would have been no need for this Court to remand the case to the Board.[21]

In *ILA I*, this Court cautioned that "the analysis is not, as the parties have sometimes seemed to suggest, simply a matter of deciding whether a container is more like the hold of a ship or more like a big box." *ILA I*, 447 U.S. at 509 n.23. The analysis of the court of appeals is guilty of precisely the error identified by this Court by simplistically equating the container with the hold of the ship moved shoreward. Pet. App. 25a.

21. The holdings of such cases as *Meat and Highway Drivers Local 710 v. NLRB*, 335 F.2d 709 (D.C. Cir. 1964), which upheld the lawfulness of a work allocation clause seeking admittedly "non-traditional work" on the ground that the work claimed "is of a type which the men in the bargaining unit have the skills and the experience to do," clearly have been overruled by this Court's adoption in *ILA I* of the historical and functional relationship standard.

The court of appeals failed to recognize that the application of the historical and functional relationship standard requires an examination of the *purpose* of traditional ILA work and modern container work and a comparison of their respective roles in the freight transportation system as a whole. The court declined to undertake this analysis and ignored the thorough findings of the ALJ, who carefully compared the purpose and function of traditional ILA work to each category of work sought by the Rules. The court of appeals' sweeping and summary analysis ignores this Court's caution that "the result will depend on how closely the parties have tailored their agreement to the objective of preserving the essence of the traditional work patterns." *ILA I*, 447 U.S. at 510 n.24. This Court thereby recognized that some of the work sought by the Rules might be historically and functionally related to traditional ILA work while other categories of work might not be, even though all the work sought by the Rules involved the loading of cargo piece by piece into containers. *Id.*

In *ILA I*, this Court recognized that distance as well as purpose could affect the definition of function by noting that if the ILA attempted to follow containers around the country and "assert the right to stuff and strip them far inland," the work claimed by the ILA "would bear an entirely different relation to traditional longshore work, and would require a wholly different analysis." *ILA I*, 447 U.S. at 510 n.24. The rationale of the court of appeals, however, would subsume even this situation. No matter how far inland the containers were moved, it would still be true that some employee would be stuffing and stripping the container "piece by piece," and therefore, according to the court of appeals, the Board "could not conclude otherwise" than to hold that the container work was

historically and functionally related to traditional ILA work. This result is clearly contrary to *ILA I*.

The Board, unlike the court of appeals, recognized even before *ILA I* that the maximum utilization of skills is not the watchword for a work preservation analysis. In *Teamsters Local 282 (D. Fortunato, Inc.)*, 197 NLRB 673 (1972), Local 282 members traditionally performed inter-construction site driving and delivered supplies to project sites from local suppliers. Changes in the construction industry, however, eliminated many local suppliers and contractors began receiving prefabricated material shipped by out-of-state suppliers directly to the contractors' projects. Direct shipment of supplies eliminated the need for some of Local 282's traditional delivery work. The union responded by negotiating an agreement requiring contractors to assign to Local 282 members alone the work of driving trucks to, from or on construction sites. The Board found that Local 282's members had not traditionally done all the work sought by the agreement, and concluded that a mere physical similarity between Local 282 members' traditional work and the driving work sought by the agreement could not establish a work preservation objective:

> [T]he driving work which the unit employees here perform is considerably more limited than that which they seek to preserve. The fact that the driving of one truck may well be similar to, and require like skills as, the driving of any other truck does not persuade us that all driving work is therefore "fairly claimable" by a unit of drivers.

197 NLRB at 678. As in *Fortunato,* the fact that traditional longshore work bears a physical resemblance to the work sought by the Rules does not establish that the Rules have a lawful work preservation objective. *Accord, Plumbers and Steamfitters Local Union 342 (Conduit Fabricators, Inc.)*, 225 NLRB 1364 (1976), *remanded,* 598 F.2d 216 (D.C. Cir. 1979); *supplemental opinion,* 251 NLRB 794 (1980); *Sheet Metal Workers Union, Local 162 (Associated Pipe and Fittings Mfrs.)*, 207 NLRB 741 (1973).

D. The Court Of Appeals Erred In Holding That The Rules Must Be Held Lawful Absent A Finding That The Rules Deprive Motor Carriers And Warehouses Of Work.

The court of appeals held that the Rules cannot be unlawful in any respect absent a finding that they deprive off-pier motor carriers and warehouses of work. Pet. App. 27a-28a. Disagreeing with the Board's conclusion that loading and unloading FSL containers by motor carriers and warehousemen was work beyond the lawful reach of the Rules, the court of appeals stated:

> Prior to containerization, truckers and warehousemen handled the cargo break-bulk; unloading of the cargo from the hold of the ship by the longshoremen obviously did not hinder these off-pier practices. Thus, one cannot possibly maintain that the stripping of import containers at the pier would in any way prevent the identical off-pier work. To repeat, truckers and warehousemen do precisely what they did before the change in technology; the longshoremen have acquired none of that work. Although the longshoremen's work in this process may well duplicate the off-pier work of truckers and warehousemen, calling this set of circumstances "work acquisition" strikes us as particularly inappropriate.

Pet. App. 28a.

In so holding the court of appeals misapplied the mandate of *ILA I*. There this Court emphasized that §8(b)(4)(B) prohibits "activities whose object is to force one employer to cease doing business with another," and that §8(e) prohibits "bargaining agreements in which the employer agrees to cease doing business with any other person." *ILA I*, 447 U.S. at 503-504. In no way did the Court suggest that the outcome of the case depended upon the *effect* of the Rules on the off-pier businesses or whether they lost work to the piers. To the contrary, the Court made it clear that the impact of the Rules on the work opportunities of off-pier businesses was "irrelevant to the validity of the agreement." *ILA I*, 447 U.S. at 507 n.22. The Court clearly held that the two relevant tests of legality were first, whether the work in dispute was historically and functionally related to traditional ILA work, and second, whether the VOCCs possess the right to control the disputed work. *ILA I*, 447 U.S. at 504. Thus, the Board's finding that the motor carrier and warehouse work sought by the Rules was not historically and functionally related to traditional ILA work is of itself sufficient to establish the unlawfulness of this aspect of the Rules. No additional finding that motor carriers and warehouses lost work is necessary.

The court of appeals placed undue emphasis on the concept of "work acquisition." This term has been used to help define an unlawful secondary objective, as in *National Woodwork*, 386 U.S. at 630-31, but it has never been adopted by the Board or the courts as an independent legal test of compliance with §8(b)(4) until adopted below by the court of appeals. Clearly, this Court, in *ILA I*, was well aware that the Rules sought to claim for ILA labor "the utterly useless task of removing the contents and then repacking them . . . [which] is nothing

less than an invidious form of 'featherbedding' to block full implementation of modern technological progress." *ILA I*, 447 U.S. at 526-527 (dissenting opinion). If the Court had felt that this duplication of container work on the pier and at the motor carrier's freight station prevented the Rules from having a secondary objective, there would have been no need to remand the case.

The proscribed secondary objective is established, in the language in the Act, by the pressure the ILA placed on the steamship lines to force them "to cease doing business with any other person," including motor carriers and warehouses. Work preservation is permitted only where the union's conduct is not "tactically calculated to satisfy [its] objectives elsewhere," whether or not those objectives are to deprive the employer with whom the real dispute exists of its work. *National Woodwork*, 386 U.S. at 644; *NLRB v. Enterprise Assn. of Steam Pipefitters, Local No. 638*, 429 U.S. 507, 528 (1977). Furthermore, this Court has held that the object of a union's activity does not have to be a complete cessation of business; a violation occurs when a union coerces the neutral employer to merely change its method of doing business with the targeted employer. *NLRB v. Local 825, Operating Engineers*, 400 U.S. 297, 304 (1971). Since the enforcement of the Rules requires the steamship lines to cease doing business with motor carriers and warehouses by denying them access to containers, it is unnecessary and contrary to the decisions of this Court to examine the impact of such enforcement on the work of motor carriers and warehouses.

Assuming, *arguendo*, that the loss of work by motor carriers and warehouses is relevant to the lawfulness of the Rules, the court of appeals' assumption that no loss of work would occur is factually unsupportable. Motor car-

riers and warehouses within 50 miles of the pier would certainly lose a significant volume of work if the Rules were enforced. By eliminating break bulk handling at the pier, containerization allowed the shipment of types of commodities which could not previously be shipped due to special handling requirements or an excessive risk of loss or damage. Jt. App. 99. This work would be lost if the container could no longer be used as it presently functions. Other work would be lost because the added cost of duplicate handling at the pier would cause certain shipping patterns to be unprofitable; container work would simply be moved outside the fifty-mile zones.[22] Jt. App. 59-60, 93, 101, 115-116, 125, 131-132, 136-137. If this were not so, the Rules would not contain a provision addressed to the avoidance of the Rules by movement of consolidation operations beyond the 50-mile perimeter. Pet. App. 228a.

Thus, the true and undisputed facts are that many motor carriers and warehousemen operating within the 50-mile zones will be financially devastated by the enforcement of the Rules because there will be no duplication of work opportunities. The work will be altogether lost by motor carriers and warehouses within the 50-mile zones.[23] These undisputed facts support the ALJ's finding that "application of the Rules [with respect to short-stopping and specialty warehousing] is viewed as an attempt to offset job losses on the piers by disrupting inland work patterns." Pet. App. 137a. The clear goal of the

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22. The contention of the Respondents, that "[t]he change in business practices which would constitute the 'cessation of business' element of the Board's trucking and warehouse rulings in this case is minimal," is preposterous. Shipping Group Brief in opposition to Petition for Certiorari, Addendum at 9 n.8.

23. Motor carriers and warehousemen are not fungible entities. The fact that a motor carrier or warehouseman outside the 50-mile zone may handle the break-bulk cargo is no consolation to those within the zone who have lost work.

Rules is to prevent motor carriers and warehousemen from performing container work in the hope that customers will transfer that work to the piers rather than beyond the 50-mile perimeter. Such an object is proscribed by Sections 8(b)(4)(B) and 8(e).

CONCLUSION

The judgment of the court of appeals should be reversed and the Decision and Order of the Board should be enforced. Substantial evidence supports the ALJ's findings, adopted by the Board, that short-stopping and specialty warehouse work is not functionally related to traditional ILA work. Therefore, the attempt to interdict this work for the benefit of longshoremen by the enforcement of the Rules violates the secondary boycott provisions of the Act, irrespective of the amount of work lost or the economic impact of the enforcement of the Rules on the off-pier transportation functions.

Respectfully submitted,

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No. 84-861

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC., and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,
Respondents,
and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE RESPONDENT TEAMSTERS UNION

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QUESTION PRESENTED

Whether the National Labor Relations Board correctly concluded that the collectively bargained rules governing the use of containers in the shipping industry, in their application to certain widespread practices of motor carriers and warehouses, lack a valid work preservation objective and therefore constitute unlawful secondary activity under §§ 8(b)(4)(B) and 8(e) of the Labor Management Relations Act, 29 U.S.C. §§ 158(b)(4)(B), (e).

PARTIES BELOW

The judgment of the court of appeals upon which review is sought was rendered in four consolidated cases. The International Brotherhood of Teamsters was a party in two cases below (Nos. 83-1185(L) and 83-1486). Other parties in the consolidated cases (Case Nos. 83-1185(L), 83-1214, 83-1424 and 83-1486) include: American Trucking Associations, Inc., and Tidewater Motor Truck Association; International Association of NVOCCS; American Warehousemen's Association; Houff Transfer, Inc.; National Labor Relations Board; International Longshoremen's Association, AFL-CIO; New York Shipping Association, Inc.; Council of North Atlantic Shipping Associations; Florida Custom Brokers and Forwarders Association, Inc.; Twin Express, Inc.; International Container Express, Inc.; San Juan Freight Forwarders, Inc.; Chester, Blackburn & Roder, Inc.; Eagle, Inc.; Eller & Company, Inc.; Harrington & Company, Inc.; Strachen Shipping Company and Marine Terminals, Inc.; Coordinated Caribbean Transport, Inc.; International Longshoremen's Association, Locals 333, 846, 862, 921, 953, 970, 1248, 1355, 1416, 1416-A, 1429, 1458, 1526, 1526-A, 1624, 1680, 1736, 1783, 1784, 1819, 1840, 1922 and 1970, AFL-CIO; International Longshoremen's Association, Atlantic Coast District Council, AFL-CIO; International Longshoremen's District Council, Baltimore, Maryland; International Longshoremen's Association, Hampton Roads District Council, AFL-CIO; Hampton Roads Shipping Association; and Southeast Florida Employers Port Association.

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BRIEF FOR THE RESPONDENT TEAMSTERS UNION

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Fourth Circuit is officially reported at 734 F.2d 966; it is set forth in full in the Joint Appendix accompanying the petitions for certiorari (Pet. App. 1a) and is unofficially reported at 116 L.R.R.M. 2311. The decision and order of the National Labor Relations Board (Pet. App. 35a) on which this review proceeding and enforcement action are based is officially reported at 266

N.L.R.B. 230, and is unofficially reported at 112 L.R.R.M. 1305.[1]

JURISDICTION

The judgment of the Fourth Circuit Court of Appeals was entered on May 9, 1984 (Pet. App. 1a). Timely petitions and suggestions for rehearing *en banc* were filed; they were later denied on July 31, 1984, with three judges voting to rehear the cases *en banc* (Pet. App. 31a). The NLRB's Petition for a Writ of Certiorari was granted on January 21, 1985 (Jt. App. 261). 53 U.S.L.W. 3523. Although the Teamsters Union petitioned for certiorari in No. 84-684, its petition has not been acted upon by the Court. Accordingly, it is before the Court as a respondent supporting the position of the petitioner under Sup. Ct. Rule 21(4). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Labor Management Relations Act of 1947 ("LMRA"), §§ 8(b)(4), 8(e), 29 U.S.C. §§ 158(b)(4), 158(e), are as follows:

Section 8(b), 29 U.S.C. § 158(b), provides in pertinent part:

> "It shall be an unfair labor practice for a labor organization or its agents—
>
> "4(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is:

[1] Citations to the Appendix filed with the certiorari petitions will be designated "Pet. App." "Jt. App." refers to the Appendix filed with this Court on March 1, 1985, while references to the appellate appendix below will be prefaced by "C.A. App." The employers and unions bound by the Rules on Containers will be referred to collectively as the "Shipping Group"; those challenging the Rules, including the Teamsters, will be designated the "Trucking Group." The union parties will be referred to as the "ILA" or the "Teamsters," as appropriate, and the petitioner will be variously called the "NLRB" or "Board."

> "(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful . . . any primary strike, or primary picketing; . . . ."

Section 8(e), 29 U.S.C. § 158(e), provides in pertinent part:

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void. . . ."

STATEMENT OF THE CASE

A. Procedural History

The procedural history of this proceeding is complex.[2] Essentially, it encompasses nine NLRB cases challenging

[2] The cases involved in this proceeding, with their subsequent histories, are as follows: *Dolphin Forwarding, Inc.*, 236 N.L.R.B. 525 (1978), *enforcement denied and remanded*, 613 F.2d 890 (D.C. Cir. 1979), *aff'd*, 447 U.S. 490 (1980); *Associated Transport, Inc.*, 231 N.L.R.B. 351 (1977), *enforcement denied and remanded*, 613 F.2d 890 (D.C. Cir. 1979), *aff'd*, 447 U.S. 490 (1980); *Consolidated Express, Inc.*, 221 N.L.R.B. 956 (1975), *enforced*, 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977), *mandate recalled and remanded*, No. 75-4266, 2d Cir., Oct. 1, 1980; *Puerto Rico Marine Management, Inc.*, 245 N.L.R.B. 1320 (1979), *remanded*, No. ——, 5th Cir., (unreported); *Beck Arabia, Ltd.*, 245 N.L.R.B. 1325 (1979), *remanded*, No. 79-1672, 4th Cir., Dec. 24, 1980; *Terminal Corp.*, 250 N.L.R.B. 8 (1980) (reconsideration granted *sua sponte*); *Hill Creek Farms, Inc.*, Case Nos. 4-CC-1133, 4-CE-55

the legality of the Rules on Containers under the hot cargo and secondary boycott prohibitions of the LMRA. 29 U.S.C. § 158(b)(4), (e). The Rules are contained in collective bargaining agreements between the International Longshoremen's Association and various employer associations representing sea carriers and stevedoring concerns (Pet. App. 207a-39a). This proceeding was begun after the Court, in *NLRB* v. *Longshoremen's Ass'n*, 447 U.S. 490 (1980), faulted the Board's earlier work preservation analysis and remanded *Dolphin Forwarding* and *Associated Transport* for reconsideration. Other pending cases, including one that was newly filed by the Trucking Group, as well as one closed case that was reopened and remanded to the Board, were then consolidated with those remanded by this Court (Pet. App. 44a-45a).

After a hearing in the consolidated proceeding, the parties agreed upon a stipulated record (Pet. App. 77a-78a). Remaining evidentiary disputes were settled by orders entered by the Board or the Administrative Law Judge (Pet. App. 77a nn.5-9). On September 29, 1981, the ALJ issued his decision, supplemental decision and recommended order (Pet. App. 65a, 205a). The Board adopted the recommended order as its own on February 28, 1983 (Pet. App. 60a-61a). Enforcement was denied by the Fourth Circuit Court of Appeals on May 9, 1984 (Pet. App. 30a).

(then pending before NLRB); *Custom Brokers & Forwarders Ass'n. of Miami, Inc.*, Case No. 12-CE-30 (then pending before NLRB); *American Trucking Ass'ns, Inc.*, Case Nos. 22-CC-806 to -808 and 22-CE-44 to -46 (complaint issued Feb. 10, 1981). On January 19 and February 18, 20, 1981, the NLRB issued orders consolidating the foregoing cases for hearing on the issues raised by this Court's decision in *NLRB* v. *Longshoremen's Ass'n*, 447 U.S. 490.

B. Statement of Facts

The Rules on Containers have a lengthy history in waterfront labor relations.[3] They were developed in collective bargaining by the Shipping Group in response to the container innovation. From 1956, when the first container ship arrived at the Port of New York (Jt. App. 175), containerization has led to one dispute after another. This is because the enormous productivity gains attributable to containerization have lessened job opportunities for longshoremen (Pet. App. 46a; Jt. App. 154; C.A. App. 624), *Longshoremen's Ass'n I*, 447 U.S. at 495, and the ILA has sought both to preserve the traditional work of its members and acquire replacement work for them.

1. *Historic Longshore Work*

Before containerization, two types of ocean-borne cargo moved across the piers: breakbulk cargo and bulk cargo. The former type consisted of general or conventional cargo, such as loose merchandise, equipment, goods or commodities, that was moved piece-by-piece, while the latter was comprised of bulk products (e.g., grain, chemicals, phosphates, sugar, scrap and similar commodities) that remained virtually unaffected by the container innovation (C.A. App. 627). Much breakbulk cargo is still handled by deepsea ILA labor at the 34 Atlantic and Gulf Coast Ports involved in this proceeding (C.A. App. 627-28). But containerization has assumed an important role in general cargo handling, with adverse consequences for the traditional roles of affected employees.

Traditionally, longshoremen working at the piers performed all handling necessary for moving breakbulk cargo between the ship's hold and the tailgate of the truck

[3] The Rules on Containers and their history have been described many times. See cases and authorities cited in note 1, *supra*. See also *Longshoremen's Ass'n I*, 447 U.S. at 494 nn. 2, 3 and authorities cited therein.

dispatched for pick-up or delivery (Pet. App. 4a-5a, 46a, 105a-106a). This work entailed the loading and unloading of ships by mechanical and manual means, and included the securing of ocean cargo on board vessels. Additional tasks were performed in moving cargo piece-by-piece through marine terminals. Thus, breakbulk cargo had to be checked, sorted, palletized and stored, as well as physically moved by longshoremen. Cargo repair, carpentry, dock equipment repair, and paperwork associated with the receipt and delivery of cargo were also tasks typically performed by ILA labor (*id.*; Jt. App. 151; C.A. App. 1167-73).

On the export side, breakbulk cargo was removed from the tailgate of the truck by ILA labor or Teamsters, depending on the practice at the port (Pet. App. 105a n.28). Longshoremen would then move the cargo by hand truck and later by mechanized hi-los to a place of rest in the terminal building. There, unless the task had already been performed beside the truck, ILA checkers would tally the cargo. It would also be marked and weighed. In preparation for loading, the cargo would be sorted according to type, port of destination or hatch, and placed on wooden pallets by other longshoremen. Thereafter, terminal employees would move the cargo to the end of the ship's tackle on the pier where it was received by loading gangs and lifted into the ship's hold. Longshoremen working in the hold would detach the cargo from the tackle, stow it according to a predetermined plan, and secure the cargo so it could not shift during the voyage (Jt. App. 161; C.A. App. 1167-73).[4]

Import cargo was handled in essentially the same manner, except the process was reversed. Upon arrival at the port, longshoremen would identify and remove cargo destined for that port from the ship's hold. Cargo remaining

[4] The work of other ILA crafts is summarized in the ALJ's decision (Pet. App. 106a).

aboard the ship would be shored or restowed as necessary for its protection. Using hand trucks and later hi-los, longshoremen would move the cargo to designated areas within the terminal. There, palletized cargo would be broken down, wooden boxes opened and unloaded, and the cargo would be sorted according to type, size, shape and consignee. Fragile and highly pilferable cargoes were placed in security areas. Before the cargo was released to the consignee, or a common carrier, it would be tallied by ILA checkers. Finally, the cargo would be moved to the dock by longshoremen for loading in trucks, either by ILA labor or Teamsters (Jt. App. 152; C.A. App. 1167-73).

2. *Containerization And The ILA's Response*

The term "containerization" refers to automated cargo handling made possible by the development of reusable, metal containers specially designed for ocean and limited surface transportation, in which cargo is unitized, and the associated technology for the handling and transportation of containers (Pet. App. 45a, 93a-95a). *Longshoremen's Ass'n I*, 447 U.S. at 494. Even before the advent of the modern container,[5] cargo unitization was not a new idea. During World War II, the military services shipped special cargoes in reusable boxes of small dimension (8′ square) (Jt. App. 152-53). After the war, sea carriers engaged in the Puerto Rico trade acquired and used small containers, called "Dravo" and "Conex" boxes, of the same size (8′ square) or slightly larger (Pet. App. 96a; Jt. App. 235-36; C.A. App. 599-600). By the mid-1950's, larger containers ranging from twelve to twenty

[5] The modern container is a metal, reusable receptacle for cargo that may be 20, 35 or 40 feet in length. The largest containers hold up to 30,000 pounds of cargo. Containers are designed to fit the chassis of some trucks, as well as in the holds of specially designed container ships. *Longshoremen's Ass'n I*, 447 U.S. at 494. Mechanized equipment for handling containers, such as cranes, derricks, stuffing and stripping sheds, straddle carriers and heavy-duty forklifts, was gradually introduced at various ports as containerization spread (Pet. App. 96a n.22; C.A. App. 636).

feet in length had appeared at the Port of New York (Pet. App. 96a; C.A. App. 1173). Their use rapidly spread to other ports. Until 1957, however, containers were carried on the decks of conventional breakbulk ships (Pet. App. 96a).

Arrival of the first automated container ship at the Port of New York in 1957 heralded eighteen years of labor strife on the piers. Containerization introduced enormous efficiencies in moving ocean-borne cargo by eliminating much of the handling involved in traditional breakbulk operations. Productivity gains, however, were accompanied by pier-side job losses and dislocations for both ILA labor and Teamsters (Pet. App. 6a-7a; C.A. App. 1559-60). Longshoremen were in a position to resist these job losses; the Teamsters were not.

The Shipping Group's 1959 bargaining negotiations opened in New York. Initially, the ILA demanded that all containers be stripped and stuffed[6] at the piers by longshoremen, and the shipping employers insisted that containers move over the piers without restriction (Pet. App. 7a). An agreement was reached. In return for conceding the right of the employers "to use any and all type[s] of containers without restriction or stripping by the union" (Pet. App. 206a), the ILA obtained two important concessions: first, royalties would be paid to the ILA's benefit funds on containers handled away from the piers, and, second, stripping and stuffing performed in the Port of Greater New York, whether at the piers or terminals, or whether through direct contracting out, would be performed by deepsea ILA labor (Pet. App. 8a, 206a).

Unfortunately, the parties understood their agreement differently. The ILA maintained that it had agreed only

[6] "Stripping" refers to the act of unloading or discharging cargo from a container, while "stuffing" means the act of loading cargo into a container (Pet. App. 84a).

to permit FSL[7] containers to move over the piers without restriction, while retaining for its members the right to stuff and strip LCL[8] containers (Pet. App. 8a). The shipping employers, in contrast, contended that they had won the right to use containers freely (Pet. App. 98a). In 1962, due to continued labor unrest, the employers agreed that:

> "Where an employer-member of NYSA supplies a container which is the property of such member, to a consolidator for loading or discharging of cargo in the Port of Greater New York, it will be stipulated that such container must be loaded or unloaded by ILA at longshore rates." [Pet. App. 97-98a.]

Over the next two contract periods,[9] the tonnage of containerized cargo reached 20 percent of all cargo handled at New York. In 1967, containerization spread to the important North Atlantic trade route between New York and Europe (Pet. App. 98a). It also had become increasingly important in other Atlantic and Gulf Coast Ports by 1968 (Pet. App. 100a-01a n.26). Negotiations for the 1969 contract opened with the parties reverting to earlier positions. The ILA insisted on stuffing and stripping all containers at the piers, while NYSA countered with a demand for eliminating all restrictions on the movement of containers (Pet. App. 9a, 99a). Failing

[7] "FSL" refers to a "container which consists of cargo of a single shipper or consignee" (Pet. App. 84a).

[8] "LCL" refers to "a container which consists of cargo of more than one shipper or consignee" (Pet. App. 84a), *i.e.*, a "consolidated container load" (Pet. App. 223a). This designation is often used in conjunction with "LTL," a term referring to "a surface trailer which includes less than a load to capacity *or* cargo of more than one shipper or consignee" (Pet. App. 84a).

[9] During the 1964 negotiations, NYSA and the ILA agreed to establish a guaranteed income plan ("GAI") for the benefit of longshoremen, the first in the industry, but the container provisions were not changed (Pet. App. 98a; Jt. App. 160).

agreement, the ILA struck the Port of New York for fifty-seven days. At other ports, the strike lasted over 100 days. It was ended following membership ratification of an agreement reached by the parties with the aid of mediation (Pet. App. 99a; Jt. App. 161-64).

The Rules on Containers were included in the 1969 Agreement (Pet. App. 9a-10a, 207a-11a), and largely reflected earlier agreements on container use (Pet. App. 100a). Accordingly, the 1969 version of the Rules related solely to containers "which contain LTL loads or consolidated full container [LCL] loads" and met the additional criteria of Rule 1 (Pet. App. 208a).[10] Containers within all of the criteria of Rule 1 were to be stuffed and stripped by ILA labor (Rule 2, Pet. App. 208a).

Spurred by ILA claims of Rules' evasion and related labor strife, the Shipping Group parties met in New York on November 20, 1972 and in Dublin, Ireland on January 29, 1973. From these meetings emanated the so-called "Dublin Supplement" (Pet. App. 102a-03a, 214a). That Supplement interpreted the Rules and strengthened their enforcement (Pet. App. 10a-11a). More significantly, it expanded the Rules' application to all containers, *including FSL containers*, stuffed or stripped within fifty miles of port areas by persons other than employees of the cargo's beneficial owner (Pet. App. 215a, 224a). Also, shipping employers were forbidden to supply their "containers to any facilities operated in violation of the Rules . . ." (Pet. App. 218a).

As interpreted and expanded by the Dublin Supplement, the Rules on Containers have been included in the Shipping Group's collective bargaining agreements since 1974 with some variation (Pet. App. 47a, 222a-39a). In

[10] To come within the Rules, containers also had to come or go to any person (including a consolidator or distributor who stuffs or strips containers), other than the beneficial owner of the cargo, at points within a 50-mile radius of the pier (Pet. App. 208a).

1975, after the ILA unilaterally suspended the Rules, the shipping parties settled the immediate dispute by executing a restated version of the Container Rules that impacted heavily on warehousing practices.[11] Previously, FSL cargo could be stripped by non-ILA labor at bona fide public warehouses in port areas if normal storage fees for thirty days were paid and title remained with the beneficial owner of the cargo for that period (Pet. App. 226a). At the ILA's insistence, the warehouse exception was eliminated altogether for export cargo and narrowed for import cargo by requiring its actual storage for thirty days (Pet. App. 10a-11a, 232a). In addition, a clarification of the Rules was adopted that reinforced their application since 1973 to FSL containers handled by truckers (Pet. App. 233a).

Under the Rules on Containers in their present form, stuffing and stripping performed on any container owned or leased by a shipping employer must be done at the pier by deepsea ILA labor if such container comes from or goes to any person, other than the cargo's beneficial owner, at a point within a fifty-mile radius of the pier. Consolidated container loads coming from or bound for points outside the fifty-mile area need not be stripped or stuffed by longshoremen unless they are rehandled within the geographic area. FSL containers containing the cargo of qualified shippers or manufacturers, if loaded at their facilities by their own employees and transported intact, are excepted from the Rules' requirements. Also excepted are inbound FSL containers warehoused for at least thirty days within the geographic area, even if their contents are handled by non-ILA labor (Pet. App. 217a-18a, 223a, 225a-26a, 232a-33a).

[11] The 1975 restatement of the Rules narrowed the exception for "containers loaded with the cargo of a single manufacturer (manufacturer's label)" by adding the requirement that such containers had to be loaded at the manufacturer's facilities with its own employees in order to qualify for the exception (Pet. App. 232a).

The Rules have elaborate enforcement provisions (Pet. App. 230a-31a, 233a-34a), and prescribe severe penalties for their violation. As noted, shipping employers must refuse to furnish containers to shippers, consignees, and their agents, including freight consolidators, motor carriers and warehousemen, who operate in violation of the Rules (Pet. App. 218a). Liquidated damages of $1,000 per container, payable to the Container Royalty Fund, are levied against shipping employers who carry containers that are not stuffed or stripped by ILA labor in accordance with the Rules (Pet. App. 228a-29a). Typically, the liable shipping employer will attempt to obtain reimbursement of the fine from the offending motor carrier or warehouseman by threatening to withhold containers (Jt. App. 28, 31, 45-46, 104). Still another method of enforcement is the ILA's refusal to handle containers stuffed or stripped in violation of the Rules (Jt. App. 22, 136).

3. *Traditional Surface Transportation Practices*

a. *Motor Carriers*

Containerization diminished the work available for employees of certain surface transportation firms. Drivers and helpers employed by motor carriers, for example, were deprived of much work involved in loading and unloading trailers at marine terminals. Similarly, dock workers employed at trucking stations lost loading and unloading work to the extent cargo is transported intact in FSL containers (Pet. App. 133a; Jt. App. 11; C.A. App. 1557-60). These tasks disappeared in the container revolution. Employment at trucking stations did not increase as a result of containerization (Pet. App. 133a).

Other tasks traditionally performed by motor carrier employees in connection with export and import cargo were virtually unaffected by containerization.[12] Yet this

[12] This portion of the Statement of Facts relies heavily on the ALJ's comprehensive findings of fact (Pet. App. 132a-45a), whose

remaining work, never performed by ILA labor, is profoundly affected by the Rules on Containers. Before and after containerization, motor carriers maintained trucking terminals in port cities. Depending on the nature of their operating authority, they engaged in interstate long-haul and/or local cartage operations. Then, as now, they picked up import cargo from, and delivered export cargo to, marine terminals (Pet. App. 132a). Their operations did not change after containerization, except that cargo was hauled to and from the piers in containers instead of trailers, according to the wishes of shippers. In short, the container was substituted for the trailer (Pet. App. 135a n.51).

Prior to containerization, import cargo destined to two or more consignees was frequently picked up and loaded into a single trailer at the marine terminal. That breakbulk cargo would not be delivered directly to consignees or their agents. Instead, it would be hauled to a trucking terminal to be unloaded and reloaded into other equipment for delivery without additional cost to the shipper or consignee (Jt. App. 26-27, 65, 85-86; C.A. App. 1552-56). This practice was followed in long-haul and most local cartage operations. In long-haul operations, import cargo from a single shipper destined to a single, *nonlocal* consignee was also unloaded and reloaded at trucking stations for reasons of convenience, economy and safety.[13] If, however, the entire load of breakbulk cargo was destined locally to a single consignee (and presumably to multiple consignees on the same delivery route), delivery would be made directly from the marine terminal (Pet. App. 133a).

accuracy is not challenged by the Shipping Group. See Shipping Group's Principal Brief, at 4-5, in *American Trucking Ass'ns, Inc.* v. *NLRB*, 734 F.2d 966 (4th Cir. 1984).

[13] "For example, the freight might be reloaded for proper weight distribution, to comply with differing 'bridge formulas' in various states, or to provide for the proper unloading sequence in the destination area. . ." (Jt. App. 26).

After containerization, many motor carriers possessing interstate authority saw fit to transport FSL cargo to and from points outside local port areas exclusively or predominantly (Jt. App. 89, 110, 117, 127). Import FSL containers are picked up at marine terminals in accordance with the shipper's instructions and hauled to trucking terminals located within port areas. "Exclusive use containers," for an extra fee, are delivered intact to consignees (Jt. App. 75). Only rarely does the overland bill of lading specify exclusive use (Jt. App. 204-05). Normally, it enables the motor carrier to decide whether to deliver the container intact, or to unload the container and reload its cargo into a trailer for delivery (Jt. App. 60, 74, 222-23). The latter practice is known as "shortstopping." It is not a service offered to the shipping public. Shippers or consignees do not benefit from shortstopping and are not charged for it (Jt. App. 26, 101).

Shortstopping is mandated by the economics of surface transportation (Pet. App. 134a). Cargo is transferred off-pier between containers and over-the-road equipment by motor carrier employees to consolidate freight destined to the same geographic area into trailers having a greater capacity than the largest container; to comply with state weight limitations or to redistribute container loads that are too heavy, unbalanced, or otherwise unsafe for over-the-road transportation; to avoid deadhead runs with empty containers; to minimize per diem charges on containers as well as container maintenance costs; and to assure equipment compatibility, an important consideration because the "fifth wheel" on many tractors is not designed to accommodate container hook-ups and the tractor can be damaged if used to haul a container more than twenty-five miles (Jt. App. 9-10, 26-28, 69, 92, 97-98, 117-18, 129-31, 206-10, 212-13, 217, 222, 225-26, 229-30).

Essentially the same considerations indicate why motor carriers choose to stuff some FSL export containers at

their terminals located in port cities (Jt. App. 118). Obviously, it is scarcely more efficient to haul an empty container over-the-road to a shipper's or manufacturer's facility to be stuffed with FSL export cargo than it is to back-haul an empty container after import cargo has been stripped from it. And, tractors can be damaged by hauling incompatible containers in either direction. The economics of particular transactions control whether or not export cargo will be trucked in conventional road equipment from the shipper's facility to the motor carrier's pier-city terminal and there stuffed into FSL containers (Pet. App. 136a). Rather than delivering ten twenty-foot containers to the customer's facility and transporting them to the pier, for example, a motor carrier will haul the cargo to its terminal in trailers, stuff the ten containers, and take them to the pier (Jt. App. 7).

b. *Public Warehouses*

Inland public warehouses have long provided storage facilities and intermediate distribution services for the surface transportation of general freight (Pet. App. 137a). Warehouses have always performed cargo unloading, sorting and consolidation work (Jt. App. 97). Containerization did not change the nature of warehouse work, except insofar as cargo is now unloaded from and loaded into containers as well as trailers. Once unloaded, cargo is still sorted, labeled, palletized and stored until the owner instructs its distribution (Pet. App. 138a; Jt. App. 67-68, 96-98, 134-35). Not all work performed at inland warehouses is relevant here.[14] Of con-

[14] Import containers containing cargo that is actually stored for 30 days or more can be stripped consistent with the Rules (Pet. App. 232a). Container handling by inland warehouses, acting as stripping stations, or as competitors of marine terminal warehouses for short-term storage, was held within the Rules' lawful reach (Pet. App. 141a-42a). Similarly, the Rules' restriction on the handling of export containers by warehousemen was said to be lawfully applied to situations where "public warehouses, on behalf of shippers, have received trailer loads of cargo from a single

cern are those specialized services historically performed only by warehousemen which are interdicted by the Rules on Containers (Pet. App. 56a, 145a).

The primary function of inland warehouses is to store cargo for indefinite periods, and then to distribute it according to the owner's instructions. Consignees of import cargo use the services of warehouses to inventory and store cargo "as against flexible and unforeseeable market demand" (Pet. App. 141a), thus enabling its immediate distribution, in whole or in part, to designated customers or retail outlets (Pet. App. 55a-56a, 141a; Jt. App. 68, 96-97). Additionally, warehouses are uniquely equipped to handle certain kinds of import cargo (Jt. App. 251-56; C.A. App. 500). Both types of services are illustrated by Terminal Corporation's work for a German manufacturer of delicate firebrick requiring special handling. FSL containers loaded with brick in Germany were consigned to Terminal at the Port of Baltimore.

> "On import, Terminal would strip the container and pursuant to instructions from the exporter, would hold a portion as inventory against future orders, while distributing quantities of brick already sold. Sometimes, the brick would remain in the warehouse for less, and sometimes longer, than 30 days. The warehouse, in addition to its utility in inventorying against future orders, also made available bricks of various sizes allowing customers to make last minute determinations as to the size needed to meet their requirements." [Pet. App. 179a.]

Warehousemen also handle export cargo on behalf of single shippers which, after containerization, they have

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shipper and on behalf of the shipper stuffed that cargo into containers without performing any other specialized warehousing service" (Pet. App. 143a). The Rules are also enforceable against public warehouses that consolidate LCL freight on their own behalf or on behalf of an NVOCC or other consolidator (Pet. App. 145a n.59).

often stuffed into FSL containers. Container stuffing is an integral element of the warehouse's specialized services in handling and packing sensitive or unusual cargo (Pet. App. 126a n.46; Jt. App. 106-07). In other situations, container handling is required by the nature of the warehouse's storage and distribution services. Thus, warehouses receive and hold cargo for later consolidation and shipment with additional cargo sent by the same shipper (Jt. App. 43-44, 98). They might also receive for storage goods, equipment or materials from manufacturers or vendors, which the shipper has purchased, pending instructions from the shipper to consolidate and ship particular items overseas (Pet. App. 144a n.58, 181a-82a).

These traditional inland warehousing practices, involving special handling, storage and distribution services, often pursuant to a continuing relationship with a consignee or exporter, are not duplicated at the piers (Pet. App. 144a-45a, 180a). Like the incidental container handling performed by motor carriers (see pp. 13-15, *supra*), these warehouse services have evolved in a separate tradition of surface transportation. The work of warehouse employees in providing them was not created by containerization, and does not threaten the traditional work of longshoremen (Pet. App. 180a, 182a).

c. *Impact Of The Rules*

The foregoing motor carrier and warehouse practices involving containerized freight have been, or will be, seriously disrupted by implementation of the Rules on Containers. Enforcement actions in the form of fines, refusals to supply or handle containers, and cancellation of interchange agreements,[15] have been taken against

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[15] Equipment interchange agreements are entered into between steamship lines and motor carriers before containers are released. They govern the rights and obligations of the parties, such as per diem charges and equipment maintenance costs, while containers are in the motor carrier's possession (Jt. App. 28; C.A. App. 1225).

motor carriers and warehousemen engaged in traditional off-shore functions (Pet. App. 176a, 179a, 181a-82a, Jt. App. 22, 28, 45-46, 104-06, 136). Compliance with the Rules will result in the loss of work by motor carrier and warehouse employees, whether or not their work is actually captured by longshoremen.

One motor carrier testified that, if unable to shortstop FSL import containers, it would be forced to cease hauling containerized cargo through its port terminal (Jt. App. 131). Another indicated that, without the option to shortstop, it would cease handling twenty-foot containers altogether, even though such action would probably result in its losing the ability to carry forty-foot containers covered by the same bills of lading. To the extent possible, however, forty-foot containers would be hauled intact through the geographic fifty-mile zone (Pet. App. 298a). Necessarily, the trucker's work force would be reduced (Pet. App. 299a). Other motor carriers agreed that their inability to strip containers for convenience would cause customer and revenue losses (Jt. App. 22-23, 93).

The impact of the Rules on specialty warehousemen is equally drastic. Their enforcement in the early 1970's caused one warehouseman's customers to cease using it as their port area agent and distribution center. Its "customers simply had other trucking companies haul the containers to other facilities beyond the fifty-mile limit" (Pet. App. 295a). To avoid extra fees for container stripping and stuffing at the piers, as another warehouseman learned, even customers of long standing will divert their business to warehouses outside the fifty-mile limit (Pet. App. 301a-02a).

C. The NLRB's Decision And Order

The Administrative Law Judge concluded that the Rules had an illegal work acquisition objective as applied to container stuffing and stripping performed by motor

carriers for their own convenience and at their own expense, rather than as a service offered to the shipping public. He found "that the practice of short-stopping [import containers] is rooted in traditional motor carrier transport cargo handling procedure" (Pet. App. 134a). It "neither competes with marine cargo handling nor amounts to a subterfuge to oust longshoremen of their traditional work . . ." (Pet. App. 135a). Similarly, the stuffing of outbound FSL containers by motor carriers for convenience was found incidental to the movement of surface freight and "within the framework of traditional motor carrier practice . . ." (Pet. App. 136a).

As applied to traditional warehousing practices, the ALJ further concluded, the Rules violated §§ 8(b)(4)(B) and 8(e) of the Act. 29 U.S.C. § 158(b)(4), (e). Container stripping and stuffing integral to services unique to the surface warehousing industry are beyond the Rules' lawful reach, for this work has not been created by containerization and is unrelated to traditional services available at the piers (Pet. App. 144a-45a). The Rules were upheld in their application to *freight consolidators*, including truckers and warehousemen acting as such, as "a rational effort to return to the piers, work diverted by inducements and . . . technology . . ." (Pet. App. 129a).

The Board adopted the findings and conclusions of the ALJ with only two changes. First, it explicitly defined the work in controversy as "the initial loading and unloading of cargo within 50 miles of a port into and out of containers owned or leased by shipping lines having a collective-bargaining relationship with the ILA" (Pet. App. 57a-58a, 59a). Using this definition, the Board agreed that the Rules had an overall work preservation objective, and were lawfully applied to recapture traditional longshore work that had been diverted from the piers by containerization (Pet. App. 58a-59a). Second, while agreeing that the Rules had an illegal work acquisi-

tion objective as applied to shortstopping and certain warehousing operations (*id.*), the Board modified the ALJ's rationale in finding these violations.

The ALJ concluded that the Rules' application had an illegal objective because they "seek to compensate longshoremen for [job] losses at the expense of inland employees whose jobs did not derive from containerization . . ." (Pet. App. 123a). Though not rejecting these findings, the Board thought it unnecessary to rely on them. Instead, it concluded that the Rules' application to shortstopping and specialized warehouse services violated § 8(e) of the Act because "the duplicative work of the longshoremen, in handling cargo which is then rehandled by truckers and warehouses, no longer exists as a step in the cargo-handling process" due to the efficiency of the new container technology (Pet. App. 59a). So far as the Rules were applied to acquire work to replace that which had disappeared due to technological change, they were tainted with an illegal work acquisition objective. Accordingly, the Board adopted the ALJ's recommended orders in three cases, *Associated Transport*, *Beck Arabia* and *Terminal Corporation*, involving motor carriers and specialty warehousemen (Pet. App. 60a-61a, 193a, 198a, 200a).

D. Decision Of The Court Of Appeals

On cross petitions for review and enforcement, the Fourth Circuit Court of Appeals upheld the legality of the Rules on Containers in their entirety (Pet. App. 29a). It denied the Trucking Group's petition for review and the Board's petition for enforcement of its orders prohibiting the Rules' application to shortstopping and certain warehousing practices. The Shipping Group's petition for review was granted (Pet. App. 30a). Agreeing with the Board, the court of appeals held that the Rules represented a lawful exercise of the work preservation doctrine because they sought to preserve work traditionally performed by bargaining unit employees, and were

addressed to the shipping employers who actually possessed the power to assign the work in question (Pet. App. 26a).

On the other hand, the lower court held that the Board erred as a matter of law by deciding that the Rules' application to shortstopping and specialized warehousing violated the Act's proscriptions against secondary activity. In the appellate court's view, the Board failed to support its conclusion that the Rules were unlawfully applied to acquire the work of trucking and warehouse employees by a finding that such off-pier work actually had been transferred to the piers to be performed by longshoremen. It thought that mere duplicative cargo handling at the piers would not affect employees of truckers and warehousemen, who would continue to do what they did prior to containerization (Pet. App. 27a-28a).

SUMMARY OF ARGUMENT

The ultimate legal issues in this case are whether the Rules on Containers, as applied to certain motor carrier and specialty warehouse practices, violate § 8(e)'s hot cargo prohibition, and whether the ILA's enforcement of the Rules by coercive means violated § 8(b)(4)(B) of the Act. Resolution of these issues requires an inquiry into all the "surrounding circumstances" to determine if the Rules' purpose is to preserve or recapture traditional bargaining unit work, or if, instead, they are tactically calculated to satisfy ILA objectives elsewhere. *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612 (1967); *Meat and Highway Drivers, Local 710* v. *NLRB*, 335 F.2d 709 (D.C. Cir. 1964). An agreement or boycott whose purpose is "'to reach out to monopolize jobs or acquire new job tasks'" (*i.e.*, work the union never had) by forcing a cessation of business is secondary and unlawful. *NLRB* v. *Enterprise Ass'n of Pipefitters*, 429 U.S. 507, 528-30 n.16 (1977).

Using the analytical framework provided in *Longshoremen's Ass'n I*, 447 U.S. 490, the Board found that

container work integral to certain motor carrier practices (*i.e.*, the stripping of shortstopped import containers and stuffing of FSL export containers) and specialized warehousing services was not historically or functionally related to traditional longshore work. Nor did the work performed by inland employees in connection with these surface transportation functions displace or threaten longshoremen's work. Instead, the duplicative work of the longshoremen, in handling cargo which is then rehandled by truckers and warehouses, disappeared from the cargo-handling process due to containerization.

An object of the Rules is to acquire unrelated, unthreatening work to replace longshore work that has disappeared entirely. The Board properly held that this object is secondary and unlawful. As *Longshoremen's Ass'n I* recognized, technological innovations might impact on the work opportunities of affected employees by transforming their work so the method of doing it is changed, by shifting their work to a different location, or by eliminating it entirely. 447 U.S. at 505, 510-11. Bargaining unit work will be displaced to the extent transformed or diverted work is performed by different workers after implementation of the new technology. Valid work preservation claims can be asserted to mitigate the threat or fact of displacement in most of these situations, even at the expense of separate employers and non-unit employees who are or will be the recipients of the transformed or diverted work. Yet claims asserted to work long performed by non-unit employees, which neither displaces traditional bargaining unit work nor is historically and functionally related to it, in order to replace work that has disappeared entirely due to technological change, constitute illegal work acquisition demands.

The fact that the motor carrier and specialty warehousing work claimed is unrelated to the work lost demonstrates conclusively that the ILA is "seeking to restrict by contract or boycott an employer with respect to the products he uses, for the purpose of acquiring for its members work that had not previously been theirs." *National Woodwork*, 386 U.S. at 648 (Harlan, J., concurring). Unlike some responses to technological change the ILA's attempt to gain new, replacement work for its members was not limited to the context of its immediate relationship with shipping employers. The Rules seriously disrupt the business practices of motor carriers and specialty warehousemen, and affect adversely the relationships of those outside parties with their employees. Third-party losses of this sort become intolerable when caused by a union's attempt, "not to preserve, but to aggrandize, its own position and that of its members" by acquiring new work. *Pipefitters*, 429 U.S. at 528-30 n.16.

The court of appeals denied enforcement because it thought the Board's order was not, and could not be, supported by a finding that the Rules "deprive the truckers and warehousemen of their off-pier work by transferring all or some of it to longshoremen at the pier" (Pet. App. 27a). Contrary to the Board's findings, the lower court envisioned a regime under the Rules in which container stuffing and stripping would be performed by longshoremen at the piers, while cargo would be handled by inland employees in breakbulk form during its overland journey. Traditional inland work would not actually be acquired under the court of appeals' view of the facts.

By interjecting the requirement that the object of acquiring new work actually succeed, the court below ignored the established principle that the *object* of an agreement calling for the disruption of a business relationship, not its *effect*, is determinative of the agreement's validity. "The test is one of purpose, not effect." *Local 1066, ILA (Wiggin Terminals, Inc.)*, 137 N.L.R.B. 45, 47 (1962), quoting *Alpert* v. *Local 1066, ILA (Terminal Operators, Inc.)*, 166 F. Supp. 22, 25 (D. Mass. 1958). With this understanding, it is apparent that the court

of appeals erred in failing to give proper deference to the Board's determination that an objective of the Rules is to acquire other employees' work. To avoid the onerous requirement of duplicative handling, and still comply with the Rules, off-pier cargo handling must either be transferred to the piers or moved outside the fifty-mile zone. Work opportunities for inland employees are diminished in either event. Both of these purposes comprehend the very work acquisition or job monopolization that this Court has condemned. *Pipefitters*, 429 U.S. at 528-30 n.16.

Even if one possible purpose of the Rules is to establish the sort of regime envisioned by the lower court, the record discloses that another purpose of the Rules is to prevent inland employers from assigning the work in dispute to their employees. The latter objective is plainly secondary, and it is not necessary that the *sole* object of the agreement or conduct complained against be within the statutory prohibition to make out a violation of § 8 (b) (4) (B) or § 8(e). *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 689 (1951). Only one illegal object need appear. *NLRB* v. *Local 825, Operating Engineers*, 400 U.S. 297, 304-05 (1971).

Besides, even on the lower court's view of the facts, enforcement of the Board's order should not have been denied. Various commentators have suggested, and we agree, that a certain tolerance for agreements designed to obtain new work is warranted when they are largely confined to the immediate employer-employee relationship, and have only a slight disruptive impact on outside parties. But this is not such a case. The requirement for duplicative cargo handling significantly restricts the right of motor carriers and specialty warehousemen to do business in the normal way with customers and sea carriers. The LMRA's legislative history indicates that a work acquisition demand to redo work that is neither related to traditional unit work nor threatens such work does not

become lawful simply because an employer can permit non-unit employees to continue to perform the same work too.

ARGUMENT

I. THE RULES ON CONTAINERS EVIDENCE A SECONDARY OBJECTIVE, AND THUS VIOLATE SECTIONS 8(b)(4)(B) AND 8(e) OF THE LMRA, IN THEIR APPLICATION TO INLAND MOTOR CARRIER AND WAREHOUSE PRACTICES THAT ARE NOT FUNCTIONALLY RELATED TO THE TRADITIONAL WORK OF LONGSHOREMEN

A. Agreements Having As Their Object The Preservation Of Traditional Bargaining Unit Work, Or The Recapture Of Work That Is Historically And Functionally Related To Traditional Unit Work, Are Primary And Lawful To The Extent Their Application Is Confined To These Objectives

Section 8(b) (4) (B) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 158(b) (4) (B), prohibits labor organizations or their agents from inducing employees to refuse to handle particular goods or products, or coercing any person engaged in commerce, "where 'an object' of the inducement or coercion is to require any person to cease doing business with any other person." *NLRB* v. *Enterprise Ass'n of Pipefitters*, 429 U.S. 507, 510 (1977). The proviso to § 8(b) (4) (B) makes clear that its prohibitions reach only secondary, not primary, strikes and picketing. *Id.* In 1959, § 8(e) was added to the Act to prohibit hot cargo agreements. 29 U.S.C. § 158(e). A violation of the Act's hot cargo prohibition is made out by a showing that an agreement between an employer and a labor organization requires the cessation, either partial or total, of business relationships between the employer and any person and has a secondary objective. *Id.* at 517; *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 635 (1967).

"[A]greements made for 'primary' purposes, including the purpose of preserving for the contracting employees themselves work traditionally done by them," do not violate § 8(e). *Pipefitters*, 429 U.S. at 517, citing *National Woodwork*, 386 U.S. at 635. The determination whether an agreement calling for a cessation of business is primary or secondary "cannot be made without an inquiry into whether, under all the surrounding circumstances, the Union's objective was preservation of work for . . . [unit] employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere. . . ." *National Woodwork*, 386 U.S. at 644. An agreement or boycott whose purpose is " 'to reach out to monopolize jobs or acquire new job tasks' " (i.e., work the union never had) is secondary and unlawful. For the union's object would necessarily be to force a cessation of business, "not to preserve, but to aggrandize, its own position and that of its members. Such activity is squarely within the statute." *Pipefitters*, 429 U.S. at 528-30 n.16.

Frequently, union agreements and conduct fall between the extremes of work preservation and work acquisition. This occurs, for example, when the union attempts to recapture work actually performed by unit employees which was lost by them due to changes in the way their employer or its customers do business. E.g., *American Boiler Mfrs. Ass'n* v. *NLRB*, 404 F.2d 547 (8th Cir. 1968), *cert. denied*, 398 U.S. 960 (1970); *Meat and Highway Drivers, Local 710* v. *NLRB*, 335 F.2d 709 (D.C. Cir. 1964). The Board has recognized that "agreements or conduct aimed at recapturing or reclaiming for unit employees work which they previously performed or which otherwise constitutes 'fairly claimable work' are not proscribed by the Act." *Teamsters Local 282 (D. Fortunato, Inc.)*, 197 N.L.R.B. 673, 677 (1972); *Retail Store Employees Union, Local 876 (Canada Dry Corp.)*, 174 N.L.R.B. 424 (1969), *aff'd*, 421 F.2d 907 (6th Cir. 1970); *Retail Clerks' Union (Brentwood Markets, Inc.)*, 171 N.L.R.B. 1018 (1968).

No singular doctrine is apparent in Board or lower court decisions dealing with union efforts to recapture lost work. One commentator has roughly categorized the varying approaches according to a broad or narrow view of work reacquisition.[16] But even in decisions espousing the broad view, one unifying principle is discernible. That is, the work claimed must have displaced work formerly performed by unit employees in order to support a primary claim of work recapture or work reacquisition. Comment, *supra* note 16, at 821. *National Woodwork*, of course, teaches that "the remoteness of the threat of displacement by the banned product or services" is one of the "surrounding circumstances" to be considered when evaluating work preservation claims. 386 U.S. at 644 n.38.

This Court's decision in *Longshoremen's Ass'n I*, 447 U.S. 490, establishes the analytical framework for evaluating work preservation claims in the context of technological change. There, the Board was instructed:

> "to look at how the contracting parties sought to preserve that [traditional longshore] work, to the

[16] Comment, *Work Recapture Agreements And Secondary Boycotts: ILA* v. *NLRB*, 90 Harv. L. Rev. 815, 821-22 (1977):

> "The broad view treats work reacquisition as preservation by focusing on the displacement of unit workers; thus, technology-generated work assignments which are functionally equivalent to work previously performed by the unit, *and which have displaced that work*, may be 'reacquired'. The narrow view suggests that reacquisition is more like acquisition by focusing on the difference in the description or manner of performance of the new work from the traditional work of the unit. Under the latter view, reacquisition is a legitimate union goal only if the jobs claimed have not yet evolved into the distinct employment of other workers, or if the new work is so similar to that performed by the original unit that it is literally the same except for its performance by outsiders." [Emphasis added.]

extent possible, in the face of a massive technological change that largely eliminated the need for cargo handling at intermediate stages of the intermodal transportation of goods, and to evaluate the relationship between traditional longshore work and the work which the Rules attempt to assign to ILA members . . . ." [*Id.* at 509 (footnote omitted).]

The legal test is "whether the historical and functional relationship between this retained work and traditional longshore work can support the conclusion that the objective of the agreement was work preservation rather than the satisfaction of union goals elsewhere." *Id.* at 510 (footnote omitted).

Longshoremen's Ass'n I did not intimate that a valid union claim could be asserted to acquire new work historically performed outside the bargaining unit. Nor did this Court suggest, or even hint, that attempts to capture work that did not displace work formerly performed by unit employees could be considered primary activity under any formulation of the work preservation doctrine. Instead, it noted that "work preservation agreements typically come into being when employees' traditional work is displaced, or threatened with displacement, by technological innovation," and held: "The work preservation doctrine . . . must also apply to situations where unions attempt to accommodate change while preserving as much of their traditional work patterns as possible. . . ." *Id.* at 505, 506 (footnote omitted).

Plainly, the use of a boycott as a "sword" to monopolize jobs or acquire new job tasks when the jobs of unit employees are not threatened by the boycotted product, cannot be regarded as primary labor activity. Indeed, it is at least arguable that offensive boycotts, see, e.g., *Allen Bradley Co.* v. *Local 3, IBEW*, 325 U.S. 797 (1945), represented the very evil that brought § 8(b)(4) into being. *National Woodwork*, 386 U.S. at 630. And, in any event, this Court has not retreated from its view

that union conduct having as one of its objects the acquisition of new work by forcing a cessation of business is "squarely within the statute." *Pipefitters*, 429 U.S. 528-30 n.16.

B. The Objective Of Acquiring Work Which Was Always Performed By Employees Of Another Employer, And Which Never Threatened Jobs Inside The Unit, To Compensate Unit Employees For Job Losses Attributable To Other Causes Is Secondary And Unlawful

On remand, the Board carefully and comprehensively evaluated "the relationship between traditional longshore work and the work which the Rules attempt to assign to ILA members. . . ." *Longshoremen's Ass'n I*, 447 U.S. at 509. The inquiry thus undertaken was focused on the work of the longshoremen, not on the work of the employees of motor carriers, freight consolidators and warehousemen after the introduction of containerized shipping. *Id.* at 507. The latter work became pertinent only to identify the work claimed by the Rules so the evaluation mandated by this Court could be carried out.[17]

[17] Below, the Shipping Group argued that the ALJ failed to heed this Court's admonition to focus his analyses dealing with trucking and warehousing on the work of longshoremen. Shipping Group's Principal Brief, *supra* note 12, at 46-47. This criticism is misplaced, for it amounts to nothing more than a complaint that the ALJ took into account "all the surrounding circumstances," including "the economic personality of the industry." *National Woodwork*, 386 U.S. at 645 n.38 and accompanying text. Surely the relationship of longshore work to the work claimed by the Rules cannot be evaluated without first identifying the latter work, and then inquiring into its connection with the longshoremen's traditional work. It is also essential to trace the historical origins of the work in dispute. Some of the work now performed by motor carrier employees, and claimed by the Rules, was found to be functionally related to longshore work, as was much of the warehouse work. Other motor carrier and warehouse work was found not to be functionally or historically related to traditional longshore work. Elaborate findings were made with respect to each category of disputed work; all were thoroughly analyzed (Pet. App. 105a-07a, 132a-45a).

Using the analytical framework provided in *Longshoremen's Ass'n I*, the Board held that the Rules' application to freight consolidators was legitimized by a valid work preservation objective. It found that containerization had diverted traditional longshore work from the piers to inland freight consolidators (Pet. App. 53a, 129a). For this reason, and because the cargo handling services performed by consolidators did not differ appreciably from those available at the piers, the Board concluded that it was functionally equivalent to the traditional longshore work of handling breakbulk cargo (Pet. App. 59a, 130a-31a). Although these rulings upheld the ILA's claims to most of the work in dispute—defined as "the initial loading and unloading of cargo within 50 miles of a port into and out of containers owned or leased by shipping lines having a collective-bargaining relationship with the ILA" (Pet. App. 57)—they did not end the inquiry.

The Board's analysis of the industry's economic personality in the context of the work in dispute, as performed before and after containerization, disclosed that container work integral to certain motor carrier and warehouse practices was not functionally related to traditional longshore work. It found that the stripping of import containers (both FSL and LCL)[18] shortstopped by motor carriers at trucking terminals was equivalent to work historically done by inland employees, not longshoremen, for reasons totally unrelated to the purposes accomplished by traditional breakbulk handling at the piers (see pp. 13-14, *supra*). The same finding was made in reference to the stuffing of export FSL containers[19] at trucking terminals (see pp. 14-15, *supra*). Also, container handling that is integral to unique public warehousing practices was found unrelated to traditional longshore work on both functional and historical grounds (see pp. 15-17, *supra*).

In addition to finding that shortstopping and specialized warehousing services have "no relevance to the marine leg of the intermodal network" (Pet. App. 134a), the Board concluded that work performed by trucking and warehouse employees in connection with these surface transportation practices did not displace or threaten longshoremen's work (Pet. App. 135a). Their inland work was not created through any transformation or diversion of traditional longshore work wrought by the container innovation (Pet. App. 59a).[20] "Rather, after

[18] Neither the ALJ's analysis of shortstopping (Pet. App. 133a-35a), nor the order adopted by the Board in *Associated Transport* (Pet. App. 60a, 194a, 196a-97a), distinguished between the stripping of LCL and FSL containers for reasons of convenience entirely related to the surface transportation of freight. This work is not LCL container consolidation work fairly claimable by the Rules on Containers.

[19] LCL container consolidation by motor carriers offering this service to the shipping public, or acting on behalf of an NVOCC or other consolidator, was held subject to the Rules' lawful reach (Pet. App. 55a n.35; 137a n.54). For historical reasons, the ALJ assumed that LCL export container work would fall into this category of claimable work. *Id.*

[20] Without rejecting this finding, the Board disclaimed reliance on it: "[W]e do not agree with . . . [the ALJ's] reliance on the fact that the work now done by the truckers and warehouses is work which was not created by containerization" (Pet. App. 59a). Its disclaimer is mystifying for three reasons: (1) *National Woodwork* identifies "the remoteness of the threat of displacement by the banned product or services" as the very first "surrounding circumstances" to be inquired into, 386 U.S. at 645 n.38. (2) By instructing the Board to "focus on the work of the bargaining unit employees, not on the work of other employees who may be doing the same or similar work," *Longshoremen's Ass'n I*, 447 U.S. at 507, the Court cautioned the Board against applying an "effects" test, *id.* at 507 n.22, corrected the fundamental error of "focusing on the work as performed after the innovation took place," *id.*, and clarified considerable confusion over how to define the disputed work. But there is no indication that this Court meant to delimit the scope of the Board's inquiry, thereby leading its reconsideration to a foreordained result, *id.* at 511, or to depart from the familiar *National Woodwork* standard, *id.* at 507. (3) The Board

containerization, some of the traditional loading and unloading work of the longshoremen, which had historically been duplicated by trucking and warehousing employees, essentially was eliminated" and "no longer exists as a step in the cargo-handling process." *Id.*

An object of the Rules is to capture container work integral to shortstopping and specialized warehousing in order to replace longshore work that had disappeared altogether from the cargo-handling process due to the development of container technology. The finding that traditional longshore work had not been diverted from the piers to motor carriers and warehousemen by containerization was an essential predicate for the Board's ultimate factual conclusion that the longshoremen's duplicative, pier-side work had disappeared. A line was drawn between traditional unit work that had been diverted to non-unit employees by the new technology and work that had not been diverted but had disappeared entirely. The former work could be lawfully claimed by the Rules, but the ILA's attempt to replace the latter work with new work historically and functionally unrelated to the old constituted illegal work acquisition.

The line drawn by the Board comports with this Court's remand and is faithful to *National Woodwork* and its progeny. *Longshoremen's Ass'n I* recognized that technological innovation might impact on the work opportunities of affected employees by transforming their work so the method of doing it is changed, by shifting their work to a different location, or by eliminating it entirely. 447 U.S. at 505, 510-11. Both transformed and diverted work are often performed by different workers after im-

had to rely on the fact that containerization had not created the inland work claimed by the Rules in concluding that the longshoremen's traditional, duplicative work had disappeared. To belabor the obvious, that traditional longshore work would not have disappeared had it been transferred to inland employees by containerization.

plementation of new technology, resulting in the displacement of bargaining unit work. Valid work preservation claims can be asserted by unions, or set forth in collective bargaining agreements, to mitigate the threat or fact of displacement in these situations, even at the expense of separate employers and non-unit employees who are or will be the recipients of the transformed or diverted work.[21] Here, traditional longshore loading and unloading work was not transformed in any fundamental sense. And, to the extent their work was diverted to off-shore consolidators, the Board upheld the longshoremen's work preservation goals.

The problem becomes more acute when the technological innovation causes unit work to disappear entirely. For work within the primary unit is thereby displaced without corresponding employment gains elsewhere. Nonetheless, labor is not helpless in this situation. A price can be exacted from the primary employer to compensate employees for losses caused by its adoption of labor-saving technology. Comment, *supra* note 16, at 824. The collectively-bargained requirement for royalty payments on containers that move over the piers intact is an example of this approach (Pet. App. 234a-38a). Remaining work can be redistributed among unit employees by such devices as overtime restrictions, minimum staffing requirements and worktime guarantees. Presumably, it can also be agreed with the employer that when opportunities for new work, similar to work remaining in the unit, become available through normal business expansion (e.g., a new product line), all or part of that work will

[21] *But see, Carrier Air Conditioning Co.* v. *NLRB*, 547 F.2d 1178 (2d Cir. 1976; *Associated General Contractors of California, Inc.* v. *NLRB*, 514 F.2d 433 (9th Cir. 1975). These cases involved illegal boycotts of new products whose manufacture required the inseparable application of unit and non-unit functions. Each held that the union respondents were actually attempting to obtain the non-unit functions always performed by the manufacturers' employees, thus evidencing a secondary work acquisition objective.

be performed by unit employees. *Canada Dry Corp.*, 421 F.2d 907; *Brentwood Markets*, 171 N.L.R.B. 1018; *Local 83, Dairy Workers (Arthur Elias)*, 146 N.L.R.B. 716 (1964).

These responses to technological change are concentrated in the primary work unit, in that they are "addressed to the labor relations of the contracting employer vis-a-vis his own employees." *National Woodwork*, 386 U.S. at 645. They do not disguise secondary objectives, or purport to claim work belonging traditionally and equitably to other employees. The same cannot be said of the ILA's attempts to claim the work of motor carrier and warehouse employees through application of the Rules to replace longshore work that has disappeared entirely. There is simply no nexus between the shortstopping and specialty warehousing work claimed by the Rules (Jt. App. 237-38, 239) and the work lost by longshoremen due to containerization. That the work claimed is unrelated to the work lost demonstrates conclusively that the ILA is "seeking to restrict by contract or boycott an employer with respect to the products he uses, for the purpose of acquiring for its members work that had not previously been theirs." *National Woodwork*, 386 U.S. at 648 (Harlan, J., concurring).

The notion that unrelated, unthreatening work long performed by non-unit employees can be acquired to replace unit work lost through technological change far exceeds any formulation of the work preservation doctrine by the Board or the courts. While union efforts to recapture traditional work lost to the unit are primary and lawful, those having the objective of acquiring work not previously performed by unit employees are secondary and unlawful.[22] No case thus far has held that work

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[22] *Compare American Boilers Mfrs. Ass'n*, 404 F.2d at 551-52; *Meat and Highway Drivers, Local 710*, 335 F.2d at 714 *with Local*

which has disappeared, in contrast to having been transformed or diverted, due to technological change can furnish a lawful basis for attempting to obtain the unrelated work of innocent employees of other employers. Since "the result [under § 8(e)] . . . depend[s] on how closely the [shipping] parties have tailored their agreement to the objective of preserving the essence of the traditional work patterns," *Longshoremen's Ass'n I*, 447 U.S. at 510 n.24, it is plain that the ILA's expansive claims under the Rules are beyond anything privileged by the work preservation doctrine.

Notably, the ILA's attempt to gain new, replacement work for its members was not strictly limited to the context of its immediate relationship with shipping employers. See generally, Note, *Secondary Boycotts and Work Preservation*, 77 Yale L.J. 1401, 1410 (1968). Both in design and implementation, the Rules seriously disrupt the business practices of motor carriers and specialty warehousemen, and affect adversely the relationships of these outside parties with their employees. Enforcement of the Rules will cause the diversion of cargo to truck terminals and warehouses beyond the fifty-mile limit (see pp. 17-18, *supra*), resulting in revenue losses by affected truckers and warehousemen and job losses by their employees. Under the balance effected by the statutory scheme, third-party losses of this sort are tolerable when they are but unintended consequences of work preservation agreements. Yet they become intolerable when caused by a union's attempt, "not to preserve, but to aggrandize, its own position and that of its members" by acquiring new work. *Pipefitters*, 429 U.S. at 528-30 n.16.

98, Sheet Metal Workers' Int'l Ass'n v. *NLRB*, 433 F.2d 1189 (D.C. Cir. 1970); *NLRB* v. *Local 141, Sheet Metal Workers' Int'l Ass'n*, 425 F.2d 730, 731 (6th Cir. 1970); *Associated General Contractors of California*, 514 F.2d 433.

II. THE COURT OF APPEALS ERRED IN UPHOLDING THE RULES' APPLICATION TO MOTOR CARRIERS AND SPECIALTY WAREHOUSEMEN BY RELYING ON A SUPPOSED FAILURE OF PROOF THAT THEIR AVOWED OBJECTIVE OF ACQUIRING NEW WORK THROUGH SECONDARY PRESSURE HAD ACTUALLY SUCCEEDED

A. The Test For Secondary Activity Is One Of Purpose, Not Effect

The lower court did not dispute the Board's finding that certain motor carrier and warehouse cargo handling reached by the Rules was unrelated to the traditional work of longshoremen. Nor did it question the Board's conclusion that the duplicative, pier-side cargo handling performed by longshoremen prior to containerization had disappeared (Pet. App. 27a). In upholding the Rules' application to shortstopping and specialty warehousing despite their avowed secondary objectives, the court of appeals reasoned:

> "From these unassailable facts, the Board concluded that the ILA's attempt to preserve under the Rules loading and unloading of cargo constitutes 'unlawful work acquisition.' But the Board conspicuously failed to ground this conclusion of law in the only finding of fact that might support it: that the Rules, in preserving for ILA members the right to do this initial loading and unloading, somehow deprive the truckers and warehousemen of *their* off-pier work by transferring all or some of it to longshoremen at the pier. Put another way, the Board hung the 'work acquisition' tag on the Rules in these two instances without a finding that the longshoremen acquired anything. . . ." [Pet. App. 27a-28a.]

Thus, the court below erroneously introduced an entirely new element into traditional primary-secondary analysis, that is, a requirement that the object of acquiring new work through secondary pressure actually succeed.

This novel requirement is completely at odds with the established principle that the *object* of an agreement calling for the disruption of a business relationship, not its *effect*, is determinative of the agreement's validity. "The test is one of purpose, not effect." *Local 1066, ILA (Wiggin Terminals, Inc.)*, 137 N.L.R.B. 45, 47 (1962), quoting *Alpert* v. *Local 1066, ILA (Terminal Operators, Inc.)*, 166 F. Supp. 22, 25 (D. Mass. 1958). Just as the benefit to bargaining unit employees of acquiring new work cannot validate a secondary agreement, *Pipefitters*, 429 U.S. at 528-30 n.16, the effect of a work preservation agreement on employment opportunities outside the bargaining unit is irrelevant to the agreement's validity "so long as the union had no forbidden secondary purpose to affect the employment relations of the neutral employer." *Longshoremen's Ass'n I*, 447 U.S. at 507 n.22 (citation omitted).

The test being one of motivation or purpose, it is apparent that the court of appeals erred in failing to give proper deference to the Board's determination,[23] reached in accordance with the analytical process mandated by this Court, that an objective of the Rules is to acquire work traditionally done by other employees. Obviously, an illegal motive can, and often must, be demonstrated by evidence other than the successful attainment of the forbidden goal.[24] Thus, once an illegal work acqui-

[23] "The statutory standard under which the Court of Appeals was obliged to review this case was not whether the Court of Appeals would have arrived at the same result as the Board did, but whether the Board's findings were 'supported by substantial evidence on the record considered as a whole.'" *Pipefitters*, 429 U.S. at 531 (citations omitted).

[24] The court of appeals' insistence on proof of actual work acquisition—i.e., transfer of inland employees' traditional work to the piers—is totally inconsistent with the statutory scheme. LMRA § 10(1) requires the Board's regional offices, upon determining that reasonable cause exists to believe that a charge alleging violations of § 8(b) (4) (B) or § 8(e) is true and that complaint should

sition motive is shown and manifests itself in a cessation of business, as where the boycotting union prevents use of the disfavored product or service, it becomes immaterial whether or not unit employees actually gain work at the expense of non-union employees. See, e.g., *Carrier Air Conditioning*, 547 F.2d at 1181-84, 1187; *Associated General Contractors of California*, 514 F.2d at 436, 438.

B. The Lower Court Erred By Overlooking Substantial Evidence of Secondary Purpose

The court below envisioned a regime under the Rules in which container stripping and stuffing would be performed at the piers by longshoremen, while import and export cargo would be handled in breakbulk form by truckers and warehousemen during its overland journey. Since breakbulk handling is exactly what trucking and warehouse employees did prior to containerization, the court of appeals thought that traditional inland work patterns would remain unaffected by enforcement of the Rules (Pet. App. 28a). There are a number of problems with this approach, not the least of which is that it substitutes the court of appeals' own views of the facts for those of the Board. *Pipefitters*, 429 U.S. at 532.

Even assuming, *arguendo*, that one possible purpose of the Rules is to establish the sort of regime envisioned by the lower court, other purposes are disclosed more clearly in this case. As the Court observed in *Longshoremen's Ass'n I*, "the use of containers is substantially more

issue, to apply for preliminary injunctive relief against the allegedly illegal conduct pending decision by the Board. 29 U.S.C. § 160(1). This procedure is designed to prevent injury caused by secondary conduct, such as the actual transfer of disputed job tasks in work acquisition cases. Outstanding orders restrained enforcement of the Rules on Containers from 1975 until after the record on remand was completed. See, e.g., *Pascarell* v. *New York Shipping Ass'n*, No. 81-13, D. N.J., Feb. 24, 1981, *aff'd*, 650 F.2d 19 (3d Cir.), *cert. denied*, 454 U.S. 832 (1981). Consequently, it is not surprising that the record does not contain evidence that inland employees' work was actually transferred to the piers.

economical than traditional [breakbulk] methods of handling ocean-borne cargo." 447 U.S. at 494 (footnote omitted). It is unrealistic to assume that shippers, consignees and implicated industries will easily surrender the economies of containerization (Jt. App. 73-74), at least not while other alternatives exist. Almost certainly, practices will be developed to avoid duplicative on-pier and off-pier cargo handling. To comply with the Rules—particularly if the Shipping Group chooses to extend the geographic zone further inland (Rule 7(a), Pet. App. 282a)—off-pier cargo handling traditionally performed by certain inland employees must be transferred to the piers when these practices are developed.[25]

Record evidence introduced on remand demonstrates that enforcement of the Rules against shortstopping and specialized warehousing will drive this traditional inland work outside the fifty-mile zone (Pet. App. 294a, 297a, 300a). Warehouses will lose business to other warehousing operations located beyond the geographic zone (Pet. App. 295a, 301a-02a). Without the option to shortstop, motor carriers will find it uneconomical to transport containerized cargo through port areas, and will stop engaging in this business entirely or partially (Pet. App. 229a; Jt. App. 131). Necessarily, the resulting customer and revenue losses (Jt. App. 93) will lead to work force reductions among inland employees (Pet. App. 299a). Even the transportation of large containers intact through the fifty-mile zone to avoid pier-side handling (Rule 2,

[25] This development is anticipated by the ILA's claim "that the loading and unloading of land transportation which takes place away from the pier could be done by them on the pier with equal efficiency." *Longshoremen's Ass'n I*, 447 U.S. at 526 (Burger, C.J., dissenting). See also Brief For Respondent ILA, at 12 n., in *Longshoremen's Ass'n I*, 447 U.S. 490 ("If, for reasons of safety, convenience or economy, the truckers did not wish a FSL container to proceed to its destination intact, it is undisputed that the redistribution of containerized cargo could as readily have taken place at the piers as at the trucking stations. . .").

Pet. App. 225a) will result in work losses for dock and platform workers engaged in cargo handling.

Literally, in their application to s[illegible]ortstopping and specialty warehousing, the Rules' purposes include the transfer of traditional inland work to the piers for performance by deepsea ILA labor and/or the elimination of non-ILA cargo handling within the fifty-mile zone. The first purpose assumes that longshoremen will acquire traditional inland work at the expense of trucking and warehousing employees, while the second envisions that, even in the absence of corresponding longshore work gains, cargo-handling work performed by non-unit employees within the geographic zone will be eliminated. Work opportunities for the employees of motor carriers and warehousemen now performing the disputed work are diminished in either event. Both of these purposes plainly comprehend the very work acquisition or job monopolization that this Court has condemned as secondary and lawful. *Pipefitters*, 429 U.S. at 528-30 n.16.

These additional purposes shown by substantial evidence on the record support the Board's conclusion that, in their application to traditional inland work, the Rules violate the Act's secondary proscriptions. For they are tactically calculated to satisfy the ILA's goal of preventing inland employers from assigning cargo-handling work to their employees. *Longshoremen's Ass'n I*, 447 at 510. Unquestionably, it is not necessary that the "*sole* object" of the agreement or conduct complained against be within the statutory prohibition to make out a violation of § 8(b)(4)(B) or § 8(e). *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 689 (1951). Only one illegal object need appear. *NLRB* v. *Local 825, Operating Engineers*, 400 U.S. 297, 304-05 (1971); *NLRB* v. *Carpenters District Council of New Orleans*, 407 F.2d 804, 806 (5th Cir. 1969).

Multiple errors were committed below. First, contrary to established principles, the court of appeals insisted on

proof that the ILA's secondary work acquisition objective actually succeeded, failing to recognize that the test is one of purpose, not effect. Second, the lower court substituted its own view of the facts for those of the Board by postulating a scenario in which it thought inland work patterns would not be disrupted. Third, it overlooked substantial evidence that the Rules indeed had secondary work acquisition objectives so far as they were directed at the traditional work practices of motor carriers and warehouses, any one of which furnishes adequate ground to support the violations found by the Board. Errors of such dimension require reversal.

C. The ILA's Application Of The Rules Is Unlawful Even Upon The Lower Court's View Of The Facts

Besides, even under the lower court's view of the facts, enforcement of the Board's order should not have been denied. To see why this is so, it is necessary to accept, *arguendo*, the notion that the ILA's motive was not to acquire any work of inland employees; that, theoretically, new work was sought for its members in response to generalized dislocations caused by containerization. Various commentators have suggested,[26] and we believe, that a certain tolerance for work acquisition is warranted to enable the process of collective bargaining to deal effectively with the often serious impact of technological change on employee job security. *Cf.*, *National Woodwork*, 386 U.S. at 640. "A union attempt to gain new work strictly limited to the immediate employer-employee context threatens none of the injury to outside parties

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[26] See Cassman, *Deconsolidating The Work Preservation Doctrine: Dolphin-Associated Transport*, 4 Indus. Rel. L.J. 604 (1981); Ebel, *Subcontracting Clauses and Section 8(e) of the National Labor Relations Act*, 62 Mich. L. Rev. 1176, 1188-89 (1964); Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRB §§ 8(b)(4) and 8(e)*, 113 U. Pa. L. Rev. 1000, 1019-28 (1965); Note, 77 Yale L. J. at 1410-12; Comment, 90 Harv. L. Rev. at 821-28.

that the secondary prohibition supposedly guards against," and ought not to be branded inherently secondary and unlawful. Note, 77 Yale L.J. at 1410. Labor-management negotiation over job assignments should not be precluded "if the bargaining unit moves into new areas of production, or if technological change produces new jobs within the union's jurisdiction. . . ." *Local 98, Sheet Metal Workers*, 433 F.2d at 1201 (Wright, J., dissenting).

For these reasons, the suggestion that any attempt to acquire new work in an effort to mitigate the effects of innovative technology is per se unlawful carries disturbing implications for the future. There is positive danger in excluding collective bargaining as one avenue for discovering solutions to the elusive labor problems caused by technological advances. *National Woodwork*, 386 U.S. at 650 (Harlan, J., concurring). Nor is this the only reason for caution. Little imagination is needed to envision future situations in which a union agreement or activity designed to obtain new work is so largely confined to the immediate employer-employee relationship, and the disruptive impact on third parties so slight, as to be outside the Act's secondary prohibitions. *Cf., Operating Engineers*, 400 U.S. at 305. These situations should not be anticipated.

Our reservations do not extend to the instant case, even as the court of appeals saw it. To the extent they are applied to acquire new work, as here, the Rules on Containers are not confined to the ILA's relationship with sea carriers and marine terminal operators. Nor can their disruptive impact on outside parties be reasonably described as "slight." Quite apart from the fact that the onerous requirement for duplicative cargo handling will cause inland employees to lose their traditional work, *supra p.* 39, this requirement significantly restricts the right of motor carriers and specialty warehousemen to do business in the normal way with shippers, consignees and

sea carriers. As such, it is an "injurious alternative" to a complete cessation of business, having a severe disruptive impact well within the intendment of the statute's prohibitions. *Cf., General Longshore Workers, ILA Local 1418 (E. Harris Mercer)*, 235 N.L.R.B. 161, 168-69 (1978); *Teamsters Local 85 (Southern Pac. Transp. Co.)*, 199 N.L.R.B. 212, 215 (1972).

A work acquisition demand or agreement to redo work that is neither related to traditional unit work nor threatens such work is not saved from illegality under §§ 8(b)(4)(B) or 8(e) simply because an employer, at its option, can suffer the economic penalty of having non-unit employees do the same work too. This situation, among others, was featured in *Allen Bradley Co.*, 325 U.S. 797, and enabled Senator Ellender to give the following example of a "secondary boycott" during the legislative debate over the need for secondary prohibitions:

> Another example is the New York Electrical Workers Union, the IBEW . . . . [N]o employer who manufactures electrical equipment outside of New York has a ghost of a show of having his equipment placed in the large buildings in New York City. *When such equipment is sent to New York City, the IBEW local refuses to install it unless it is permitted to tear all the equipment apart and assemble it again.* Of course, one can readily understand that such procedure is unconscionable and that it results in high costs to those engaged in the erection of office buildings, homes, and stores; in fact, all sorts of buildings requiring electrical equipment. [93 Cong. Rec. S 4255 (daily ed., April 28, 1947), *reprinted in* 2 NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 1056 (emphasis added).]

Although *Allen Bradley's* precise influence on the legislative intent underlying § 8(b)(4) is open to argument, *National Woodwork*, 386 U.S. at 629-30, the foregoing reference is sufficiently explicit to indicate that Congress

did not intend to approve job acquisition attempts of the sort envisioned by the court of appeals (Pet. App. 28a). We submit, therefore, that even on the lower court's view of the facts and the inferences it drew, the ILA's enforcement of the Rules on Containers violated §§ 8(b)(4)(B) and 8(e).

CONCLUSION

The object of the Rules and their enforcement in the circumstances of this enforcement proceeding is to monopolize all cargo loading and unloading in the fifty-mile zone to assure its performance by deepsea ILA labor. Failing attainment of that object, the Rules alternatively seek to assure that no one else engages in cargo-handling work within the geographic zone regardless of existing work patterns. As applied to shortstopping and specialty warehousing, the Rules' objectives are blatantly secondary. For these and other reasons set forth above, the decision of the court of appeals should be reversed and the cause remanded with instructions to enforce the Board's order.

Respectfully submitted,

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No. 84-861 (7)

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

and

HOUFF TRANSFER, INC., *ET AL.*, *Respondents*

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *ET AL.*, *Respondents*

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF FOR RESPONDENT HOUFF TRANSFER, INC. IN SUPPORT OF THE PETITIONER

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34pp

QUESTION PRESENTED

Having acknowledged the fact that certain of the longshoremen's traditional cargo-handling work has been rendered "unnecessary" -- could the Court below then properly conclude that the ILA had a lawful work-preservation purpose in enforcing a claim to functionally distinct cargo-handling work that **prior to** "containerization" had **always** been performed by **motor-carrier employees after the longshoremen had completed their now eliminated traditional work?**

PARTIES TO THE PROCEEDING

The decision of the Court of Appeals was issued in four consolidated cases seeking review or enforcement of decisions of the National Labor Relations Board. The Board was the petitioner in one of these cases and a respondent in the other three. In Case No. 83-1486 below, Houff Transfer, Inc.[1] was an intervenor whose interests were aligned with the Board's. The International Longshoremen's Association, AFL-CIO (ILA) appeared as petitioner in one of the consolidated cases, intervenor in another, and respondent in the other two; also appearing as petitioner, intervenor, and respondent was the Council of North Atlantic Shipping Associations. Additional respondents were

[1]In compliance with Rule 28.1, according to information supplied to counsel of record for Houff Transfer, Inc., it has no parent companies, subsidiaries, or affiliated corporations.

the ILA Hampton Roads District Council; the ILA Atlantic Coast District Council; the ILA District Council, Baltimore, Maryland; ILA Locals 333, 846, 862, 921, 953, 970, 1248, 1355, 1416, 1416-A, 1429, 1458, 1526, 1526-A, 1624, 1680, 1736, 1783, 1784, 1819, 1840, 1922, and 1970, AFL-CIO; the Hampton Roads Shipping Association; Southeast Florida Employers Port Association; Coordinated Caribbean Transport, Inc.; Chester, Blackburn & Roder, Inc.; Eagle, Inc.; Eller & Company, Inc.; Harrington & Company, Inc.; Strachen Shipping Company; and Marine Terminals, Inc. American Trucking Associations, Inc., Tidewater Motor Truck Association, and the New York Shipping Association appeared as petitioners and intervenors below. The International Association of NVOCCs, Florida Custom Brokers and Forwarders Association, Inc., Twin Express, Inc., and International Container Express, Inc., were petitioners

below. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America; the American Warehousemen's Association; and San Juan Freight Forwarders, Inc., also were intervenors below. Under Rule 19.6 of the Rules of this Court, all of these parties except the Board are respondents in this Court.

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STATUTES

BRIEF FOR RESPONDENT HOUFF TRANSFER, INC. IN SUPPORT OF THE PETITIONER

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 734 F. 2d 966 and may be found in the Joint Appendices To Petitions previously filed in this Court at pages 1-30.[2] The Decision and Order of the National Labor Relations Board in **International Longshoremen's Ass'n. (Dolphin Forwarding, Inc.), (Dolphin II)** is reported at 266 NLRB 230 (1983) and also may be found in said Joint Appendices at pages 35-64.

JURISDICTION

The Judgment of the Court of Appeals was entered on May 9, 1984 (Jt. Apps. to Pets. at 3 and 30). Petitions for Rehearing

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[2]The various petitioners in Nos. 84-677, 684, 691, and 696 joined in the preparation of said Joint Appendices.

and Suggestions for Rehearing En Banc, timely filed by Houff Transfer, Inc. and other parties, were denied by the Court of Appeals on July 31, 1984 (Jt. Apps. to Pets. at 31-34). The Petition herein[3] was filed on November 28, 1984, and was granted by Order of this Court filed January 21, 1985 (A. 261). The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act (29 U.S.C. §151 **et seq.**) (NLRA) are as follows:

Section 8(b), 29 U.S.C. §158(b), provides in pertinent part:

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[3]Houff Transfer, Inc., a charging party in the Board proceedings and an intervenor in the Court of Appeals, also filed a petition (No. 84-869) on November 28, 1984.

> It shall be an unfair labor practice for a labor organization or its agents --
>
> 4(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where ... an object thereof is:
>
> * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person ... **Provided**, That nothing contained in this clause (B) shall be construed to make unlawful ... any primary strike, or primary picketing;....

Section 8(e), 29 U.S.C. §158(e), provides in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such

an agreement shall be to such extent unenforceable and void....

STATEMENT OF THE CASE

In these consolidated cases, the ultimate issue addressed by the Administrative Law Judge and the National Labor Relations Board was whether and to what extent Rules on Containers promulgated by the ILA and the Shipping Associations, but having a devastating impact upon other employers and their employees, legitimately sought to preserve to ILA laborers certain cargo-handling work traditionally and historically performed by them.

In the **Associated Transport** cases, in which Houff Transfer, Inc. was a charging party, it was alleged that the ILA and Council of North Atlantic Shipping Associations ("CONASA") were engaging in violations of

Section 8(e)[4] of the National Labor Relations Act (hereinafter the "Act"), by agreeing to cease doing business with motor-carrier employers whose employees continued to engage in their traditional work of handling freight in preparation for its over-the-road transportation. Houff and the other charging parties also filed separate charges alleging that the ILA was engaging in violations of Section 8(b)(4)(ii)(B)[5] of the Act,

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[4]29 U.S.C. §158(e) (1976). These charges were that ILA and CONASA agreed: To cease and refrain from -- and they did cease and refrain from -- handling, transporting or otherwise dealing in freight moving to and from the charging parties; and further to cease doing business -- and they did cease doing business -- with the charging parties.

[5]29 U.S.C. §158(b)(4)(ii)(B) (1976). The labor organization was charged with threatening, coercing and restraining vessel-owner employers with an object of forcing them: To cease handling, transporting or otherwise dealing in freight moving to and from the charging parties; and to cease doing business with the charging parties.

by enforcing the above-described agreement between CONASA and the ILA.

The Administrative Law Judge and the Board found and concluded that the Rules, in pertinent part, unlawfully sought to acquire for ILA laborers certain cargo-handling work traditionally and historically performed by motor-carrier employees; and that such employees' work always had been and is functionally distinct from eliminated cargo-handling work formerly performed by ILA laborers. The Circuit Court, however, refused to enforce these **Associated Transport** rulings.

Houff Transfer deems the Board's statement of the case to be a sufficient narrative of the procedural history of, and the substantive rulings in, these consolidated cases. It is the purpose of this statement of the case to invite the Court's attention to certain indisputable facts that Houff believes to be most pertinent. Houff

also suggests that the Board has cited and argued the pertinent authorities. Accordingly, Houff will offer limited arguments that the Court of Appeals has drawn logically incorrect and legally impermissible inferences from the following facts, which are clearly supported by substantial evidence:

ILA laborers traditionally handled ocean-going cargo only at the piers, moving and placing packages, cartons, crates, boxes and other containers, of various sizes and descriptions, on and off ships (Jt. Apps. to Pets. at 105-107).

About twenty-five years ago, the owners of ocean-going vessels began to develop their use of significantly larger containers, usually between twenty and forty feet in length. Cargo was loaded or "stuffed" into these larger "trailer-containers", which could be loaded on and off ships without loading and unloading the

individual cargo items. As the handling of "containerized" cargo continued to develop, ships were fitted for carrying large numbers of trailer-containers which were loaded on and off ships by cranes. These containers were designed so that they could be hooked onto a power unit for motor-carrier transportation in the ordinary tractor-trailer configuration (Jt. Apps. to Pets. at 93-96).

Prior to the shipping companies' utilization of "trailer-containers", and prior to the advent of "containerization" in the maritime industry, motor-carrier employees picked up import cargo at the piers with **local** equipment (A. 25-26). Motor-carrier freight handlers then reloaded the cargo, with other freight, onto motor-carrier equipment in preparation for over-the-road transportation (A. 26-27). With respect to export cargo, motor-carrier employees transported such cargo and other freight to the

trucking terminal in the port city, for reloading into local equipment in which the ocean-going cargo was taken to the piers (A. 24; Jt. Apps. to Pets. at 136-137).

The handling of **FSL cargo** -- that is, a single shipper's cargo housed in an export container or a single recipient's cargo housed in an import container -- also has been performed by motor-carrier employees in connection with over-the-road transportation of the cargo (A. 25-29; Jt. Apps. to Pets. at 132-137). The FSL container became the "**local**" trailer or was used instead of the "**local**" truck.

The cargo-handling work at the trucking terminal always has been and remains necessary in the conduct of surface-transportation operations (A. 25-29; Jt. Apps. to Pets. at 132-137). This work always has been performed by motor-carrier employees in the ordinary course of their daily duties,

both before and after "containerization", and **never** has been performed by longshoremen (A. 27-28; Jt. Apps. to Pets. at 133-137). "Containerization" did not eliminate the previously-existing necessity that import and export cargoes frequently be reloaded at port-city trucking terminals in the usual and ordinary conduct of surface-transportation operations (A. 27-28; Jt. Apps. to Pets. at 133 and 136). **"Trailer-containers" were interchanged in the surface transportation industry prior to "containerization" in the maritime industry, and motor carriers always have unloaded and reloaded freight housed in their own trailers and in other owners' containers** (A. 28; Jt. Apps. to Pets. at 134).

The facts could not support any conclusion, and the Court of Appeals has not concluded, that "containerization" in the maritime industry created any new work of

reloading cargo in connection with its over-the-road transportation **or that any of the longshoremen's former work was displaced. Exactly to the contrary, the Circuit Court Opinion specifies that the longshoremen's former work has been eliminated** (Jt. Apps. to Pets. at 27).

Indeed, the Opinion below apparently concedes that **all** of the foregoing facts are supported by substantial evidence. In fact, the Court below summarized these facts as follows:

> "Prior to containerization, both the longshoremen and the truckers handled the break-bulk cargo as it moved from the ship to the consignee. Longshoremen would perform the initial unloading of the ship, moving the cargo piece by piece to the local seaport terminal. From there, truckers usually hauled the cargo to their own terminal or freight station, where they would reload it into their over-the-road equipment. With containerization, the off-pier work of the

> shortstopping[6] truckers remains essentially unchanged except that they unload cargo from containers instead of from motor trucks. **And with containerization, of course, the work formerly performed by the longshoremen has been rendered unnecessary because the container can be fastened to the chassis of a truck and transported intact to the trucking terminal or freight station."** [Emphasis added.] (Jt. Apps. to Pets. at 27).

Turning to the provisions of the Rules on Containers that are at issue upon the writ of certiorari, and their effects upon Houff Transfer, the ILA never asserted any work-jurisdiction claim affecting FSL containers or cargo until approximately fifteen years **after** the advent of "containerization". The ILA and CONASA, during 1973 and again during 1974, entered into totally

[6]"Shortstopping" is a term that has **never** been employed in the surface-transportation industry. It is a "label" applied by the ILA and the Shipping Associations to motor carriers' local freight reloading operations that always have been performed both prior and subsequent to the utilization of containers in the maritime industry.

unprecedented agreements that their Rules on Containers would thereafter apply to FSL containers. Previously, the Rules and the ILA's claim of work jurisdiction had applied only to LTL or consolidated containers. In a 1973 "Dublin agreement", however, the Rules were "interpreted" by the ILA-CONASA Joint Committee on Containers to apply to FSL containers. Consistent with their new "interpretation", the ILA and CONASA purported to establish a new rule, restricting the handling of FSL cargo within fifty miles of the port to ILA laborers and to employees of the actual shippers and recipients of such cargo (Jt. Apps. to Pets. at 103).

The 1974 ILA-CONASA Agreement for the first time incorporated Rules provisions consistent with the 1973 "Dublin agreement". The 1974 Rules very clearly purported to apply to FSL containers (Jt. Apps. to Pets. at 103).

Pursuant to these unprecedented agreements, fines of One Thousand Dollars were imposed upon vessel owners for each and every container with respect to each infraction of the new rules provisions (Jt. Apps. to Pets. at 87-88). The ILA and Shipping Associations imposed such fines and caused cancellation of interchange agreements between vessel owners and motor carriers, specifically including Houff Transfer, who saw fit to continue their established practices of handling FSL cargo and other freight in the performance of their routine surface-transportation operations (A. 28, 205-207, 245-248; Jt. App. to Pets. at 176). The ILA and CONASA thereby caused vessel owners to cease giving freight to motor carriers whose employees continued to handle FSL cargo and to cease furnishing such motor carriers with containers (A. 245-248; Jt. Apps. to Pets. at 103).

After the "Dublin agreement" affecting FSL containers, Houff Transfer continued its practice of reloading FSL cargo at its trucking terminals. In early 1974, Houff picked up three FSL containers at the piers in Baltimore. Such containers, which were destined to points in Virginia and West Virginia, were transported by Houff to its Baltimore terminal and there unloaded by Houff's employees, who then reloaded the cargo into Houff's equipment. These particular containers were unloaded because they were unsafe and heavier than permitted by Virginia weight laws and in order to minimize the expenses of transporting the cargo on the highways. ILA representatives learned of Houff's actions and caused the vessel owners who had furnished the containers to Houff to be fined One Thousand Dollars in respect of each of the containers. When Houff refused to pay the vessel owners for

the ILA fines, the vessel owners cancelled interchange agreements with Houff and, by refusing to furnish containers to Houff, ceased doing business with it. As a result, Houff's opportunities to transport FSL cargo were drastically diminished (A. 28, 201-210, 245-248).

SUMMARY OF ARGUMENT

Clear and substantial evidence, on the record considered as a whole, inescapably dictated the Administrative Law Judge's and the Board's conclusions: (1) That the ILA and CONASA entered into an unlawful agreement to cease doing business with motor carriers; and (2) That the ILA illegally enforced said agreement. These conclusions were based upon specific findings that the ILA and CONASA had sought to claim for ILA laborers certain cargo-handling work that always had been performed by motor-carrier employees and that was functionally

unrelated to eliminated cargo-handling work formerly performed by ILA laborers. The Circuit Court decidedly has **not** concluded that these findings are "clearly erroneous".

The Board's conclusions might have been avoided **only** if substantial evidence had supported precisely opposite findings that the work of handling freight in connection with and in preparation for its over-the-road transportation, in circumstances dictated by motor-carrier operations, economics, and convenience, had once been work performed only by longshoremen or is work that is functionally equivalent to work formerly performed by longshoremen. Substantial evidence supporting such findings might have led to conclusions that the ILA's and CONASA's otherwise unlawful acts fall within a judicially defined, narrow "work-preservation" exception to the provisions of Sections 8(b)(4)and 8(e) of the Act.

The indisputable facts acknowledged by the Court of Appeals cannot support any conclusion that the 1973 and 1974 alterations to the ILA-CONASA Rules on Containers were directed to and affected **only** work which was traditional work of longshoremen, because such alterations purported to limit **any** port-area handling of FSL cargo to ILA laborers and to the cargo shippers' and recipients' employees, **whether or not** such handling was functionally related to traditional longshoremen's work.

As fully established by the record in this case, ILA laborers had **never** engaged in the cargo handling at issue, nor in any functionally equivalent cargo handling. Rather, the record indisputably establishes that motor-carrier employees have **always** engaged in handling FSL cargo **and** other freight in connection with and in preparation for its over-the-road transportation,

in circumstances dictated by the convenience and the operational and economic needs of motor-carrier employers. Such work is in no respect functionally equivalent to, or even in any way related to, the now eliminated work formerly performed by ILA laborers.

ARGUMENT

The ILA Could Not Have Had a Lawful Work-Preservation Purpose in Enforcing a Claim to Functionally Distinct Cargo-Handling Work That Prior to "Containerization" Had Always Been Performed by Motor-Carrier Employees After the Longshoremen Had Completed Their Now Eliminated Traditional Work

Clear and substantial evidence fully supports the detailed facts found by the Administrative Law Judge and affirmed by the Board. As previously noted, the Circuit Court has not concluded that any of those findings of fact are "clearly erroneous". Indeed, as quoted at pages 11-12 of this Brief, the Court of Appeals approvingly

summarized the findings of facts (Jt. Apps. to Pets. at 27).

Upon these specific, detailed findings of facts, however, the Court below concluded:

> "From these unassailable facts, the Board concluded that the ILA's attempt to preserve under the Rules loading and unloading of cargo constitutes 'unlawful work acquisition'. But the Board conspicuously failed to ground this conclusion of law in **the only finding of fact** that might support it: that the Rules, in preserving for ILA members the right to do this initial loading and unloading, somehow deprive the truckers and warehousemen of **their** [emphasis in original] off-pier work by transferring all **or some of it** to longshoremen at the pier.... [O]ne cannot possibly maintain that the stripping of import containers at the pier would in any way prevent the identical off-pier work." [Emphasis added.] (Jt. Apps. to Pets. at 27-28).

Exactly contrary to the above-quoted conclusion, **other** indisputable facts of record, established by clear and substantial evidence, fully support the Administrative Law Judge's and the Board's ultimate

conclusions in the **Associated Transport** cases. Such facts, summarized below, were unheeded by the Circuit Court.

The indisputable facts are that the Rules on Containers never have provided that any FSL containers are to be unloaded by ILA laborers at the piers; what the Rules changes in 1973 and 1974 did specify was that such container loads could initially be handled within fifty miles of the piers only by ILA laborers or by employees of the cargo shippers or cargo recipients; that is, if motor carriers elected for their own operational reasons to reload such freight at their trucking terminals, as they always had done, such freight-handling was specified to be a Rules violation. Stated another way, the Rules purported to say that **only** ILA laborers or employees of the cargo shippers or recipients could engage in the initial cargo-handling in the port area, regardless of

whether the cargo-handling was functionally related to pier operations or to surface-transportation operations.

It is emphasized that for approximately fifteen years **after** the advent of "containerization", the Rules made no work-jurisdiction claim to **any** FSL cargo-handling. **And even the new 1973 and 1974 Rules permitted the initial loading and unloading of FSL cargo by employees of the cargo shippers or recipients, but then purported to forbid any such cargo-handling by motor-carrier employees.** At least to this extent, the ILA and CONASA have tacitly acknowledged that longshoremen cannot fairly claim, and they have not claimed, that **any** initial loading or unloading of FSL cargo in the port area is "equivalent" to the loading or unloading of ships.

The Rules' claim (after 1973) is that ILA laborers are entitled to accomplish the

work of unloading and reloading FSL containers <u>only if and when</u> the motor carrier, for its own reasons, elects for the cargo to be transferred to its own trailer. If a motor carrier does **elect**, for its own reasons, to have the container cargo reloaded onto **its** trailer, and such reloading is to be done by ILA laborers at the pier, it would be economic folly, if avoidable, to again reload the freight onto yet another motor-carrier trailer at the trucking terminal. Motor carriers undeniably would, at the least, **attempt** to cause their over-the-road drivers and equipment to pick up the unloaded container cargo at the piers. This necessarily would result in lost work opportunities, not only for the motor-carrier freight handlers, but also for local drivers.

Thus, if the Rules provisions in question are to be enforced, substantially more reloading necessarily will be done at the

piers and will not necessarily be duplicated at the trucking terminals, and the motor-carrier freight handlers' work will be taken from them, even though the work is necessary or convenient, and traditionally had been performed before "containerization", **because of** surface-transportation operational considerations.

The 1973 and 1974 Rules changes have not continuously deprived motor-carrier freight handlers of <u>their</u> traditional work <u>only</u> because such Rules changes have either been enjoined or unenforced during most of the years since their promulgation. It would be one thing for the ILA to claim the right to unload all FSL containers at the piers; reloading at trucking terminals, in such event, would continue to be necessary and desirable in similar circumstances to those which dictated such reloading prior to "containerization" in the maritime industry.

But the Rules' claim, in effect, is that ILA laborers shall perform **not** the equivalent of the pier work formerly performed by longshoremen but the **exact** surface-transportation work formerly performed by motor-carrier employees.

By the same process, the ILA could assert that longshoremen are entitled to claim and acquire **all** of the initial FSL cargo handling in the port areas. The Court of Appeals' analysis in this case more correctly would support a claim that the employees of the cargo shippers and recipients could **not** load or unload FSL containers in the port areas. Because such employees would still, presumably, load or unload cargo onto or from trucks at their employers' places of business, they also presumably would not lose any work opportunities. But it cannot be gainsaid that this broader claim, like the claim at issue in this case, would have

a devastating impact upon the shipping and surface-transportation industries.

As distinguished from the circumstances potentially affecting employees of the cargo shippers and recipients, however, it is emphasized that motor-carrier freight handlers necessarily will lose work opportunities if ILA laborers are allowed to acquire functionally distinct work that has been and is convenient or necessary **because of** the exigencies of surface-transportation operations.

All of these incontrovertible factual circumstances unassailably support the Administrative Law Judge's and the Board's "unlawful work acquisition" conclusions, and the Court of Appeals should have enforced the Board's ruling.

CONCLUSION

Upon all of the foregoing, Houff Transfer, Inc. respectfully prays that the

Judgment of the Court below be reversed and that the case be remanded to the Court of Appeals with directions that the Decision and Order of the National Labor Relations Board in the **Associated Transport** cases be enforced.

Respectfully submitted,

William L. Auten
<u>Attorney for Respondent</u>
<u>Houff Transfer, Inc.</u>

ment, we often get other domestic business. Attached as Exhibit D is a sales flyer used in connection with the export consolidation business. As the flyer indicates, the service offered by Jayne's and San Juan moves less-than-trailerload shipments faster than other services offered to Puerto Rico. Attached as Exhibit E is a points directory indicating the services offered by Jayne's and the areas serviced. Jayne's sales effort with respect to the export less-than-containerload consolidation service also extends to Puerto Rico.

21. The pickup and delivery of freight and containers involves a series of contracts and communications between Jaynes, its customer, customs brokers, VOCC's and San Juan. All pickups, whether for the Puerto Rico consolidation operation or for normal domestic shipment, are arranged through Jayne's dispatch office. Customers call this office to request that Jayne's dispatch a driver to their facility to pick up cargo. When the driver arrives at the customer's facility, the driver signs a prepared bill of lading. Attached as Exhibit F is an example of a bill of lading. The bill of lading is the motor carrier's contract with its customer for the carriage of the goods. As the document indicates, the cargo movement is subject to the terms and conditions of the Uniform Domestic Straight Bill of Lading which is contained in the National Motor Freight Classification. Exhibit F indicates that the cargo covered by the bill is consigned to a consignee in Carolina, Puerto Rico. The driver's signature is at the bottom of the bill on the line labeled "shipper, per." Section 2(a) of the Uniform Straight Bill of Lading provides:

> No carrier is bound to transport said property by any particular schedule, train, vehicle or vessel, or in any particular market or otherwise than with reasonable dispatch.

Because Jayne's is responsible for cargo in its possession it retains complete control over this cargo. Section 2(a)

provides Jayne's the control needed to ensure safe and efficient freight transport.

22. A driver will make several pickups of less-than-trailerload cargo before returning to the Elizabeth terminal. When the pickup schedule is completed and the driver returns, the truck trailer is then stripped of the cargo. The cargo is sorted as to destination so that reloading for delivery may take place. Freight destined for San Juan, for instance, is placed in a certain location on the dock. It is then loaded for export the following day.

23. When a container destined for Puerto Rico is full, Jayne's calls San Juan to inform them of that fact. Jayne's also tells San Juan the total pieces and weight of the cargo. From this information San Juan makes up a dock receipt which enables the steamship company to accept the container when it is delivered to the pier. A San Juan driver then comes to our Elizabeth terminal to pick up the container for transport to the pier. Jayne's supplies this driver with a manifest indicating the contents of the container. The driver signs the manifest as proof that Jayne's has turned over the container to San Juan. A copy of such a manifest is attached as Exhibit G. The driver's signature, "Rudy", can be seen at the bottom of this manifest and is dated 1/2/81.

24. For freight not destined to San Juan, Jayne's prepares a freight bill from the bill of lading which specifies the cargo to be loaded into truck trailers for delivery to consignees. The freight bill is a six-part document, with one part serving as a delivery receipt. When the driver delivers the cargo to the consignees, the delivery receipt is kept as proof that the cargo was turned over.

25. Jayne's does make some pickups and deliveries from and to the piers. With respect to import cargo, a customs broker sends to Jayne's a pickup or delivery order indicating what cargo to pick up at the pier and where on the pier the cargo can be found. Examples of this document are attached as Exhibits E-1 through E-3. Jayne's directs a driver to pick up the import cargo at

the pier. If the cargo is less-than-trailerload shipment, the pickup at the pier would be one of several pickups made by the driver on a given day. If the import shipment is a full container load, the driver would go to the pier with a tractor, pick up the container and return to the Elizabeth terminal.

26. When a driver arrives at the pier, he intially gets in line with the other truckers waiting for entrance to the pier area. After getting in line the driver would check in at the pier gate. When the driver checks in he informs the person at the gate which container he wishes to pick up. The pier employee then tells the driver at what location on the pier the container can be found. Once inside the pier area the driver proceeds to the location of the container. The driver hooks on the container and leaves through a checkout gate. At the checkout gate the condition of the container is examined and an equipment interchange receipt is filled out. An example of such a receipt is attached as Exhibit I. The interchange receipt indicates that the interchange is subject to the terms and conditions of the Uniform Intermodal Interchange Agreement between the delivery and receiving carriers. This agreement provides Jayne's with complete control over containers released to it. The agreement provides:

> User shall have the right of complete control and supervision of equipment while in its possession and shall be responsible for returning the equipment in the same condition as received, ordinary wear and tear excepted.

This agreement governs the leasing of containers by the VOCC's to Jayne's. Under the terms of its tariff the VOCC agrees to make containers available. The driver then returns with the container to the terminal or delivers the container directly to the consignee. The amount of time needed to pick up a container or another less-than-containerload shipment from the pier varies between

a half hour and four hours. The vast majority of this time is spent waiting in various lines at the pier.

27. With respect to export cargo, cargo is either picked up by Jayne's at its customer's facility or is dropped off at the Jayne's terminal by other carriers. In order to make a delivery to the pier, Jayne's must have a dock receipt. A dock receipt is furnished either by a shipper at the time of pickup or by an export broker through the mail. The information on the dock receipt is that which is used by the VOCC to write an ocean bill of lading. The dock receipt also identifies the type of cargo and the pier to which the cargo is to be delivered. With respect to less-than-containerload export shipments, the delivery of the cargo to the pier by a Jayne's driver will be one of several deliveries made by the driver during the day. The driver would arrive at the pier, get in line and report to the check-in station. The driver would provide the document clerk at the gate with the dock receipt. The driver would then have to wait until a receiving door is available. When the driver's truck has been unloaded, the driver would leave and make other deliveries.

28. The process is different for delivering full container loads to the pier. The driver would arrive at the pier but would wait in a different line than the driver carrying less-than-containerload freight. The driver would present his dock receipt to the document clerk and an employee, probably of the steamship company, would inspect the container for damage. Exhibit I, the equipment interchange receipt, consists of two pages. The second page is the receipt which is filled out when the container is returned. After the container is inspected, the driver is told where in the yard to leave the container. On some occasions this instruction is delayed because there is insufficient room in the area designated for a particular ship for all the containers which are to be loaded on to that ship.

29. The delivery of less-than-containerload cargo for export may take between a half hour and eight or nine

hours. On occasion our drivers have waited an entire day without being able to get into the terminal area to have their trucks unloaded. With respect to full container loads, the time required for delivery is much less, though it can range between a half hour to six hours depending on lines at the pier. Because of the delays inherent in delivery of less-than-containerloads to the pier, it is not profitable, and Jayne's turns over much of this work to other carriers.

30. Prior to January 1, 1981, the ILA's Rules never interfered with Jayne's operation. Much of the container work allegedly performed by Jayne's in violation of the Rules developed after enforcement of the Rules was enjoined, although this same work on break bulk cargo was performed by Jayne's for years prior to and after containerized freight became prevalent. The December 6, 1980, agreement betwen the ILA and the VOCC's to enforce the Rules on Containers has adversely effected Jayne's business. In 1979, Jayne's loaded approximately 100 containers with consolidated loads. This constitutes approximately $100,000 worth of business. Jayne's did even more of this business in 1980. Under the ILA's Rules, the ILA would have to strip and restuff each of the consolidated full containers at the pier in order for them to be loaded onto the VOCC's steamship. Since January 1, 1981, when the ILA began enforcing its Rules, Jayne's has delivered one container to the pier. The ILA has refused to load the container unless it is permitted to strip and restuff the cargo. This is the container, the contents of which are represented on the manifest attached as Exhibit G. Jayne's has a second fully loaded container at its terminal, but has been informed by San Juan Freight Forwarders that the steamship company will not load the container unless it is first stripped and restuffed by ILA labor. Jayne's would ordinarily deliver at least two containers a week to the pier. Each container generates revenues of about $1,000. Enforcement of the ILA's Rules, therefore, has and will continue to

cause irreparable financial harm to Jayne's. Enforcement of the Rules has also caused Jayne's to drop plans for expansion of its consolidation services.

31. In addition to the effect on Jayne's business, enforcement of the Rules effectively eliminates the advantages of containerization. The delivery and pickup at the pier of less-than-trailerload cargo has always been significantly more time consuming than the delivery and pickup of full container loads. The increased amount of less-than-trailerload work which enforcement of the ILA's Rules will necessitate will undoubtedly increase the lines at the seaport terminal and lengthen what are already intolerable delays. Detention charges required to be paid by the sea carriers to motor carriers are not sufficient to offset the loss of revenue caused by these delays.

/s/ Robert W. Hagemann
ROBERT W. HAGEMANN

AFFIDAVIT OF C. E. HOUFF

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

I, C. E. Houff, being first duly sworn, depose and say:

I am, and since its incorporation in 1947 have been, President and the principal stockholder of Houff Transfer, Inc. (hereinafter "Houff Transfer"). Houff Transfer is and has been an irregular-route motor common carrier of general commodity freight in interstate commerce and has operated under a certificate of convenience and necessity issued by the Interstate Commerce Commission.

In 1948, Houff Transfer began operating its own trucking terminal at Baltimore, Maryland, and in 1955, began operating such a terminal at Norfolk, Virginia. At all times since the beginning of these terminal operations, Houff Transfer has employed fulltime local drivers and freight handlers to accomplish the work of picking up and delivering general commodity freight moving in interstate and foreign commerce, including intermediate handling of such freight for various purposes. Further, at all such times, Houff Transfer regularly and continuously has picked up such freight at the piers of the Baltimore and Hampton Roads ports, delivering such freight to the piers in these ports for loading onto ships.

Over these years, I have actually participated in the performance of the port-city freight handling and transportation work detailed in this Affidavit. Additionally, as President of Houff Transfer, I have directed and closely observed and monitored such work performed by Houff Transfer's drivers and freight handlers and by employees of other motor carriers with whom Houff Transfer competes. Accordingly, the matters set forth in this Affidavit are based entirely upon my personal knowledge of and experience in motor-carrier transportation activities and freight handling in the Baltimore and Hampton Roads ports.

In the early years of Houff Transfer's operations in these ports, large "trailer-containers" in twenty to forty foot lengths had not yet been introduced into the maritime industry. Even during these early years, however, Houff Transfer regularly and continuously utilized large trailers in its operations, ranging from twenty-four to thirty-five feet in length. Such trailers presently utilized by Houff Transfer range to a maximum length of forty-five feet. Although large "trailer-containers" were not regularly loaded on and off ships in the Baltimore and Hampton Roads ports until the mid-1960's, large boxes, crates and metal containers, up to eight feet in length, were regularly loaded on and off ships during the 1950's without any handling of the enclosed cargo by any workers at the piers. Both motor-carrier employees and stevedores and other pier workers participated in loading these boxes, crates and metal containers onto motor carriers' trailers. This loading was accomplished by such employees' utilization of cranes, custom motorized equipment and ramps. Loose or "break bulk" freight items in small boxes and other packages were loaded onto motor carriers' trailers both by motor-carrier employees and by stevedores and other pier workers.

The freight housed in larger boxes and crates and in the early metal containers routinely and frequently included smaller packages which were to be transported over the highways to different inland locations. Similarly, the smaller loose or "break bulk" freight items picked-up at the piers by a single truck or trailer frequently and routinely were destined to different consignees or recipients at different inland locations.

During these years prior to maritime utilization of large "trailer containers", Houff Transfer almost always received instructions from consignees' employees or consignees' brokers or other agents to pick up freight at the piers for transportation to the consignee at some inland location. In response to these instructions, Houff Transfer

would dispatch either a "straight truck" or a tractor-trailer to the piers to pick up the freight in the manner previously described. After the freight had been loaded onto the trucks or trailers at the piers, the trucks or tractor-trailers returned directly to Houff Transfer's trucking terminals in both the Baltimore and Hampton Roads ports. In the overwhelming majority of cases, these trucks or tractor-trailers were driven by "local" or "city" drivers whose driving work was performed only in the port-city geographic area. In practically all cases, the "local" or "city" truck or trailer would be unloaded at the port-city trucking terminal for reloading onto "over-the-road" equipment. Most frequently, this was because the freight that had been picked up at the piers was destined to multiple inland locations and would be loaded into different trucks or trailers which would be driven to such locations. Even in the relatively rare instances where truck-load freight was picked up at the piers, such freight would be reloaded either because it was destined to various inland points or for various other operational reasons. For example, the freight might be reloaded for proper weight distribution, to comply with differing "bridge-formulas" in various states, or to provide for the proper unloading sequence in the destination area. This work of loading and reloading trucks and trailers at the port-city trucking terminal was and is a regular, routine and continuous part of motor-carrier operations at all trucking terminal facilities and always has been accomplished by motor-carrier freight handlers in the ordinary course of their daily duties, as a part of motor-carrier overhead and without any additional charge to either the shipper or the recipient of the freight. These employees have been paid to perform this work because the work has at all times been necessary or convenient in the conduct of surface transportation operations. It has been and is precisely the same loading and unloading work that always has been done at all trucking terminals in order to accomplish and facilitate over-the-road transportation of freight. It is work which always has been routinely and continuously performed by motor-carrier employees, for many of the same reasons, both prior and subsequent to the introduction of "trailer-containers" into the maritime industry.

These work patterns of motor-carrier employees were not in any way altered by the introduction of "trailer-containers" into the maritime industry. After the "trailer-containers" were introduced into the maritime industry, the vast majority of the freight housed in such containers was not handled by any employees at the piers. Rather, the containers were placed intact on the piers and were hooked onto motor-carrier tractors by motor-carrier employees. Specifically, containers housing "shipper's loads" were never opened at the piers, and the freight housed in such containers was never handled at the piers, but the container was towed directly to the port-city trucking terminal. That is, when containers had been loaded with freight destined to a single consignee, the contents of the container were never handled by employees at the piers. Indeed, even "LTL" or "consolidated" containers, housing cargo destined to more than one consignee, were not always opened, and their contents handled, at the piers.

Even those "LTL" and "consolidated" containers frequently were towed directly to the trucking terminal without being opened at the piers. Prior to 1974, Houff Transfer opened, and reloaded the contents of, roughly ninety percent of all containers handled at its port-city trucking terminals. The containers were opened and reloaded for many of the same reasons that local motor-carrier equipment had been reloaded at such trucking terminals. Moreover, if the containers had not been reloaded at its trucking terminals, Houff Transfer would have been confronted with the additional problem of locating contemporaneous freight traffic destined to the port-city so that its tractor and driver would be engaged in revenue-producing work while returning the container

to the port-city. Again, the problems that would have been created by compulsory utilization of a particular container at a particular time were plainly and solely motor-carrier operational concerns.

Additionally, pursuant to "interchange agreements" with the owners of the containers, Houff Transfer was required to pay a daily rental charge and certain maintenance costs for the containers. These arrangements were practically identical to interchange agreements with other motor carriers, applicable to the utilization of other motor carriers' trailers when motor-carrier equipment was transferred between motor carriers. In both cases, Houff Transfer utilized its own equipment whenever feasible, reloading the freight and promptly returning the trailer or container to its owner in order to avoid unnecessary additional expense. Once more, operational considerations which always have affected motor-carrier work patterns are involved.

In the early months of 1974, for the first time, an ocean-going vessel operator complained of Houff Transfer's reloading activities performed at its trucking terminals. This purported enforcement of the ILA-CONASA Rules on Container resulted in cancellation of interchange agreements between Houff Transfer and the vessel owners and led to the charges filed by Houff Transfer with the Board.

Houff Transfer's rights and responsibilities attending its limited utilization of containers have been established by interchange agreements with the owners of the containers. These agreements have addressed only Houff Transfer's handling of the container equipment and not the work of handling the cargo housed in the containers. Pursuant to the interchange agreement, containers have been released to Houff Transfer, and the owner of the container, by the terms of the interchange agreement and the bill of lading between Houff Transfer and the

consignor or consignee, has retained rather neither control over nor responsibility for the container or its contents. The container owners have never been involved in, nor could they have been involved in, the work of handling freight in preparation for over-the-road transportation, because the container owners and maritime operations generally have had nothing to do with the determination that the freight-handling work should or should not be done. The work has been performed only when Houff Transfer has deemed it necessary or convenient to perform it in the immediate conduct of its surface-transportation operations.

Houff Transfer has made the involved operational judgments and decisions at its port-city trucking terminals, according to the immediate requirements of its surface-transportation operations, rather than at the piers and at the time the cargo arrives at the piers. In any event, the containers may be loaded or unloaded at the consignors' or consignees' places of business by their employees. There has never been any challenge to these work practices, and Houff Transfer always has performed loading and unloading services as agent for its customers.

This is the 10th day of October, 1980.

/s/ C. E. Houff
C. E. HOUFF

AFFIDAVIT OF RICHARD W. LEE

Richard W. Lee, being duly sworn, deposes and says:

I am a former chief executive officer and director of Dolphin Forwarding, Inc. I entered the transportation industry in 1948 representing the Texas Freight Company, Inc. in the New England area. The company offered the shipping public domestic freight forwarding (Part IV Interstate Common Carriage) services overland and marine coastal shipping from all points in New England to all points in the State of Texas including shipments moving through Texas for export to Mexico. Texas Freight had been in the business of providing marine coastal shipping services transporting goods of varying size lots since prior to World War II. The principal ports of departure and entry in the northeastern area for goods shipped by water by Texas Freight were the Ports of New York and Newark and, accordingly, my experience was limited primarily to those ports.

* * * *

Dolphin was not subject to the "Rules on Containers" until late 1974 and early 1975 when the steamship companies began refusing Dolphin access to booking spaces on their ships leaving the Ports of New York and Newark for Puerto Rico. The effect of such a refusal was to deny Dolphin access to those vessels on which it was seeking to transport the containers utilized by Dolphin. Moreover, this refusal was designed to compel Dolphin to submit all containers utilized by Dolphin to forced reloading by ILA labor at pierside within the Ports of New York and Newark. This refusal was done without regard to the owner, lessor or user of the containers being utilized by Dolphin since at the time that the booking spaces were

denied, the steamship companies did not know who owned, leased or used the containers refused. In addition, Dolphin was fined a total of $11,000 for violations of the "Rules on Containers" by Maritime Transportation Management, Inc. of Puerto Rico. (*See* documents attached hereto as Exhibit "D" and incorporated hereinby specific reference). Dolphin has steadfastly refused to pay these fines on the ground that the Shipping Act forbids discrimination between persons utilizing the services of sea carriers and thus passing on by a steamship company of fines extracted as a result of the "Rules on Containers." As a result of this refusal to provide booking in early 1975, Dolphin was forced to transport its containers overland to Jacksonville, Florida, to a steamship company which did not employ ILA labor and thus was not subject to the "Rules on Containers". Dolphin experienced greatly increased cost and a consequent loss of customers as a direct result of the steamship companies' actions in enforcing the "Rules on Containers". Dolphin thereafter resumed utilizing the Ports of New York and Newark as its port of entry and departure pending resolution by the Court and various administrative agencies of the problems presented by the "Rules on Containers".

Since January 1, 1981, Dolphin has once again become subject to enforcement of the "Rules on Containers" by the steamship companies and the ILA in the Port of New York. Dolphin has been unconditionally "refused" access to any containers by the steamship companies. Moreover, Dolphin has been "refused" booking spaces for containers which were packed and sealed in Brockton, Massachusetts, a city over two hundred miles away from the Port of New York. These particular containers would have been delivered *directly* to the dockside in the Port of New York, without any further off-pier consolidation, for immediate ocean shipment.

At least two containers which were loaded and delivered to dockside in the Port of Newark since January

1, 1981 have been placed in "holding areas" and the steamship companies have "refused" to ship them to Puerto Rico. Moreover, at least one of the containers which were *shipped* immediately prior to January 1, 1981 have been stripped by ILA deep-sea labor at dockside in the Port of San Juan, Puerto Rico.

In addition to the aforementioned effects of renewed enforcement of the "Rules on Containers", Dolphin has been informed by the steamship companies within the Ports of New York and Newark that, starting as of January 1, 1981, the steamship companies will not apply their liability maximum ($500) for containers to the individual shipments therein if the containers are stripped or stuffed by the ILA. Normally, if a container were opened for any reason, the $500 amount of steamship company liability would apply to each separate shipment resulting in a greater amount of money being available from the steamship companies to cover any damage or theft. Therefore, as a result of this action by the steamship companies, Dolphin's legal recourse for theft or damage to these individual shipments has been severely restricted.

In view of these actions by the steamship companies and upon its prior experience with the "Rules of Containers", Dolphin has diverted its shipments, originally intended for the Ports of New York and Newark, to the Port of Jacksonville where non-ILA labor will not strip or stuff Dolphin's containers. The additionnal per-container charge of $1400 necessitated by this excess overland transportation will necessarily be passed on, in large measure, to the general public who utilize Dolphin's services.

Continued implementation of the "Rules on Containers" would effectively destroy the business of off-pier consolidation for any CONASA port. NVOCCs would be forced either to accept the risks and expenses of on-pier consolidation or the added costs of overland shipment of LTL goods to non-CONASA ports. Moreover, forced handling or rehandling by ILA deep-sea labor often results in enormously inefficient loading of containers. It is not an uncommon experience that shipments of goods stripped from one container by ILA labor cannot be completely stuffed by ILA labor into another container, thus requiring the use of two containers. In any event, such added costs and risks would be passed on, directly or indirectly, to the consuming public.

The ability of Dolphin to coordinate the services previously described would be seriously impaired by enforcement of the "Rules on Containers". The transportation of containers, and the goods therein, would become subject to the whim of ILA labor. Pier congestion and the need for ILA handling of all LTL goods would preclude Dolphin's previously described service of rapid location of specific containers. There would be virtually no certainty about departure or arrival times and thus Dolphin's customers would have no assurance of when goods would be delivered. Since the import/export off-pier consolidator in a CONASA port would, for all intents and purposes, become extinct, Dolphin would be unable to exercise the coordination of transportation of goods which is the most significant aspect of the NVOCC's roles in intermodal traffic.

The effect upon the efficiency of the intermodal transportation by implementation of the "Rules on Containers" would be substantially adverse, since the goal of the system is the allowance of door-to-door delivery of containerized goods with minimal handling and interruption.

The Rules would impose a significant backward step for intermodal transportation which would effectively preclude further improvement in the system within the United States.

To the best of my knowledge, information and belief, the foregoing is true.

Further affiant sayeth not.

/s/ Richard W. Lee
RICHARD W. LEE

CITY OF BROCKTON)
COUNTY OF PLYMOUTH) ss:
COMMONWEALTH OF MASSACHUSETTS)

[Sep. 23, 1980]

PUERTO RICO MARITIME SHIPPING AUTHORITY

STANDARD TRAILER INTERCHANGE CONTRACT FOR CONTINENTAL UNITED STATES

1. The undersigned enter into this agreement governing their relationship with respect to lease of trailers, and to make this agreement operative respecting lease of individual trailers will cause to be executed the interchange receipt and inspection reports hereinafter mentioned. The term trailer as used herein shall refer to any load carrying vehicle without power, except that power to operate heating or refrigerating units.

2. At the time of interchange an authorized representative of the undersigned shall execute, in multiple copies as the lessor may require, a trailer interchange receipt and inspection report. The parties shall be bound by the notations on the receipt and inspection report.

3. The lessee:

3.1 Shall complete promptly and expeditiously the use for which the trailer has been leased to it and return the trailer to the terminal of the carrier from which received at the place received; or if drawn from a pool other than at a port of the lessor, lessee shall replace said trailer in kind with one drawn from the port of return of said trailer.

3.2 Shall not permit the trailer to go out of its possession without permission of the lessor in writing, as shown on the receipt and inspection report or otherwise in writing, and then only to the extent of written permission, and shall be responsible for the safe and timely return of the trailer to the lessor ordinary wear and tear excepted, notwithstanding that it may have had the per-

mission from the lessor to lease or interchange such trailer to another party.

3.3 Shall be responsible to the lessor for the performance of this agreement by itself and by all other persons into whose possession such trailer may go until its proper return to the lessor.

3.4 Shall have complete control and supervision of such trailer while in its possession; and the lessor shall have no right to control the detail of the work of any employee or agent operating or using said trailer during such time. Any person operating, in possession of, or using said trailer after the signing of said receipt and inspection report and until such form is signed returning the trailer to the lessor is not the agent or employee of the lessor for any purpose whatsoever.

3.5 Agrees to hold the lessor harmless *for any loss of or damage thereto* and from all liability for damages to persons or property being transported therein, arising out of the use, operation, maintenance or possession of said trailer, or arising from any other cause, until said trailer has been returned to the lessor and receipt issued therefor.

4. Interchange is made on a compensation basis, as shown in the table of charges below. Settlement shall be made at the end of each month. A day shall be considered a 24-hour period commencing at 12:01 a.m., or a fraction of any 24-hour period.

5. The lessor shall be entitled to all its lawful remedies, and shall be entitled to receive from the lessee the special compensation shown in the table of charges herein for all time until return of the trailer to lessor. In the event the trailer leased shall require repairs, the lessee shall cause the repairs to be made, provided, however, that consent of the lessor shall be first obtained if apparent cost of the repairs exceeds $100. In the event a leased trailer

is damaged, other than as provided for in the preceding sentence, the lessee shall, by repair, restore it to the condition in which it was received, and, in the event of failure of lessee to make such repair, it shall, nevertheless, be responsible for the cost thereof.

6. The lessor:

6.1 Shall equip it with tires and tubes of proper size. Thereafter, until the trailer is returned, repairs to tires and tubes shall be made by and at the expense of the lessee. In the event of blowout or total failure of a tire or tubes, lessee shall furnish replacement tires and tubes to return the trailer to the lessor (but shall retain such replacement tires and tubes upon redelivery of the trailer to the lessor) and shall return the blown out or unserviceable tire and tube with the trailer. In the event of failure to so return, payment therefor shall be made at the value thereof at the time of original interchange, which in the absence of specific information to the contrary shall be $145.00.

6.2 Does not make any warranty or representation, expressed or implied, as to the fitness or condition of the trailer so leased, including tire and tubes, and the lessee acquiring the use thereof does so at its own risk and inspection; provided, however, that on trailers considered to be in such mechanical condition as to be able to make the agreed tour without failure shall be leased but any repairs to vital parts such as brakes, wheel bearings, running gear, etc., necessary to complete tour shall be made by lessee and lessor billed when such repairs are in excess of $50 and lessor agrees to pay same. Such minor repairs as lights, latches, air connections, floor patching, and any other individual repair costing no more than $50 shall be absorbed by lessee in possession. The

lessee will be responsible for the labor expense in effecting repairs to refrigerating units. The lessor will be responsible for the cost of parts to refrigerating units when the old parts are returned to the lessor.

6.3 Shall equip it with state vehicle license plates, satisfactory mud flaps, working directional signal lights, clearance marker and stop lights, reflectors, and in compliance with Part 193 of Motor Carrier Safety Regulations.

7. The lessee agrees prior to returning of empty tank trailer to lessor and upon receipt of empty tank trailer from lessor to clean interior, dome and discharge area of tank trailer, cost to be absorbed by lessee. In the event tank trailer is returned unclean, lessor will refuse to accept tank trailer or accept tank trailer and clean for the account of the lessee.

8. THIS AGREEMENT and said trailer interchange receipt and inspection report shall constitute the entire agreement between the parties and no verbal amendment or modification thereof shall be permitted. This agreement may be supplemented or amended only by a written agreement.

9. TABLE OF CHARGES

SCHEDULE

Equipment	Normal Period Charges
A) Tandem Axle Van or Open Top	$8 per day
B) Tandem Axle Chassis w/o Container	$8 per day
C) Tandem Axle Refrigerator or Tanker	$16 per day
D) Tandem or tri-axle Lowboy or Step-down Flat Bed Trailer	$16 per day

Charges Per Day For Excess Periods

Excess Period I	Line A & B	Line C & D
1st Day through 5th Day	$12 per day	$24 per day
Excess Period II	**Line A & B**	**Line C & D**
6th Day and all following days	$24 per day	$48 per day

E) On all interchanged equipment, the day of interchange and the first two days after the day of interchange will be considered as days of grace during which time no charge will be made for the use of the equipment. Where a two way movement of cargo is involved, there will be one (1) additional day of grace during which time no charge will be made for the use of the equipment.

F) The agreed normal period shall be two (2) working days (excluding Saturday, Sunday and Holidays) or fraction thereof on round trip movements of up to 300 miles; and four (4) working days (excluding Saturday, Sunday, and Holidays) or fraction thereof on round trip movements over 300 miles.

G) Charges per day for normal period shall apply to any 24-hour period or fraction thereof (excluding Saturday, Sunday and Holidays) unless otherwise specified in the interchange receipt and inspection report.

H) Where normal period ends on a Friday or a day preceding a Holiday, the following Saturday, Sunday and Holiday is excluded from charge.

I) At the termination of normal period, the first excess period shall commence and run for five calendar days.

At the termination of the first excess period, the second excess period will commence and continue for all calendar days thereafter until the equipment is returned to the lessor.

Charges for excess periods will apply for all Saturdays, Sundays, and Holidays therein.

J) Exceptions to charges for excess periods will be made and only the normal charges will apply only when such exceptions are set forth in the trailer lease inspection form covering a specific transaction, or otherwise in writing from lessor.

K) Where repairs to trailers are to be made under the provisions of Paragraph 5 (Page 2 above), the lessor shall be entitled to receive from the lessee compensation

equal to its costs each day a trailer remains out of operation because of the damage done to it. This cost or charge will be $8 and $12 per calendar day, including also Saturdays, Sundays and Holidays, for conventional and refrigerated trailers respectively.

10. Where excess trailer charges are caused by the acts of a shipper or consignee, the appropriate delay, demurrage or storage charges as outlined in the tariffs will be assessed by the carrier making the pickup or delivery. These charges will be billed by the carrier direct to the shipper or consignee separate from the normal freight charges. The lessee will still be responsible to the lessor for any excess trailer charges caused by this type of delay. The lessee's relief will be from the shipper or the consignee. The excess trailer, charges due lessor shall in no way be dependent on the collection of any delay, demurrage or storage charges from the shipper or consignee.

11. THIS AGREEMENT is for a period of one year from date and shall continue in effect from year to year. Either party to this agreement may terminate same as of any time by giving the other ten days' notice of such termination by registered or certified United States mail addressed to the other party at the address shown in this agreement or as changed by written notice.

EXECUTED AT Elizabeth, N.J./Brockton, Mass. this 5th day of August 19....

Puerto Rico Maritime Shipping Authority (NAME OF LESSOR)	Illegible (NAME OF LESSEE)
Puerto Rico Marine Management, Inc. (as agent for Puerto Rico Maritime Shipping Authority)	Illegible (NAME AND TITLE)
P. O. Box 1910, Elizabeth, New Jersey 07207 (ADDRESS)	Illegible (ADDRESS)

ADDENDUM TO STANDARD TRAILER INTERCHANGE CONTRACT

The following provisions shall apply and supercede those issued under the terms of the Standard Trailer Interchange Agreement:

I. Effective October 1, 1975, normal periods will be changed to reflect the following provisions:

Mileage (Round Trip)	Normal Period Days
0-300 miles	2
300-600 miles	4
600-900 miles	5
900 & over	6

II. Paragraph 6.1 shall be amended to read as follows:

"Shall equip it with tires and tubes of proper size. Thereafter, until the trailer is returned, repairs to tires and tubes shall be made by and at the expense of the lessee. In the event of blowout or total failure of a tire or tubes, lessee shall furnish replacement tires and tubes to return the trailer to the lessor (but shall retain such replacement tires and tubes upon redelivery of the trailer to the lessor) and shall return the blown out or unserviceable time and tube with the trailer. In the event of failure to so return, payment therefor shall be made at the value thereof at the time of original interchange, which in the absence of specific information to the contrary shall be $145.00. Lessor retains the right to determine if the cause of a blowout or a failure was due to abuse by the lessee. If such abuse is a result of a tire being run while flat, lessee shall be liable for replacement cost of new tire."

All other provisions of the Standard Trailer Interchange Agreement shall remain in effect.

EXECUTED AT Elizabeth, N.J./Brockton, Mass. this 5th day of August 19....

Puerto Rico Maritime Shipping Authority (NAME OR LESSOR)	Illegible (NAME OF LESSEE)
Phone No.:	Illegible
Puerto Rico Marine Management, Inc. (as agent for Puerto Rico Maritime Shipping Authority)	Illegible (NAME AND TITLE)
P. O. Box 1910, Elizabeth, New Jersey 07207 (ADDRESS)	Illegible (ADDRESS) Brockton, Mass. 02403

AFFIDAVIT

STATE OF NEW JERSEY)
) ss:
COUNTY OF UNION)

I, MATTHEW MAHON, JR., being of full age and duly sworn according to law depose and say:

1. I am President of Mahon's Express, located at 67 Jabez Street, Newark, New Jersey. I have been associated with Mahon's Express for the past 45 years, and for the past six years have been President of the Company.

2. Mahon's Express is a New Jersey corporation engaged in the trucking business with facilities at 67 Jabez Street, where it operates a terminal and office. During the preceding 12-month period, it derived revenue in excess of $50,000 for services performed for customers located outside the State of New Jersey. The company employs approximately 100 people, of which about 50 are drivers who cover the New York and New Jersey areas. Two of the oldest customers of the company are S. S. Kresge and F. W. Woolworth.

3. With respect to Kresge and Woolworth, Mahon's Express performs, among other services, a carrier function transporting goods from Mahon's warehouse to Port Newark for shipment to the retail stores of Kresge and Woolworth in Puerto Rico, the Virgin Islands and St. Thomas. Woolworth [1] directs its suppliers to ship certain quantities directly to the Mahon Express warehouse in Newark for forwarding to Puerto Rico. There are also shipments by common carrier, directly to Mahon's terminal from Woolworth warehouses in various states, of goods destined for Puerto Rico. In the course of preparing for shipment at the Newark terminal of Mahon, the

[1] Hereafter, references to Woolworth are to be considered as references to Kresge, as well, because the situations are identical.

goods of the individual store owner, namely, Woolworth, are at all times segregated so that in any one shipment there is no mingling of the goods of Woolworth with the goods of Kresge, or anyone else, and that any container that is shipped through the Port Newark facilities consists of only the goods of one owner. In preparation for shipment through the port, the goods are taken from the Mahon warehouse and loaded directly at the premises there into a container belonging to an N.Y.S.A. member company. The container is then sealed and shipped by a Mahon employee, that is, driving a Mahon tractor to the port facility where the container is lifted and placed on shipboard by I.L.A. crews. All bills of lading prepared for shipment of these goods indicate that Woolworth is the owner and the shipper. The bills of lading indicate that the container is destined for the particular Woolworth store in Puerto Rico or nearby islands. Upon arrival of the ship at the port of destination, the container is removed from the ship and, again, transported from the dock facility directly to the Woolworth store where the seal is then broken for the first time. Throughout the transportation of a given container, beginning from its stuffing at the Mahon Express facility, through its shipment on water, to its ultimate destination at the store in Puerto Rico, there is no breakdown of that unit and no handling of the goods therein. The only indication on the bill of lading of any connection between Mahon and the goods being shipped is that it does identify Mahon as the carrier for purposes of meeting the security provisions of the port facility.

4. Mahon's Express Company has been performing at its terminal this container service for Woolworth stores located in Puerto Rico and the Caribbean Islands since approximately 1957. At that time, the containers into which the merchandise was loaded were Alcoa containers, which were very small containers with a capacity of approximately 50 cubic feet. Later, Pan Atlantic Steam ship Company containers were used and those of Waterman S. S., which two companies were eventually bought out by Sea-Land Company. Thereafter, containers of Sea-Land, Seatrain and occasionally Transamerica were used. Now we are using containers supplied by Puerto Rican Marine Management, Inc. These companies are members of the N.Y.S.A. Prior to 1957, there were no stores of Woolworth or Kresge on the islands of Puerto Rico or nearby.

5. Since the inception of the clause in the agreement between the I.L.A. and the N.Y.S.A. (the CONASA rules), requiring the less than container and trailer loads originating within 50 miles of the port be consolidated by I.L.A., which may be approximately ten years ago, there have been various discussions between representatives of Mahon Express and the representatives of the I.L.A. and New York Shipping Association with respect to the manner in which Mahon was handling freight for Woolworth shipped through Port Newark for Puerto Rico. Over the years there have been three or four visits by representatives of the New York Shipping Association and the I.L.A. to the premises of Mahon Express, where various billing and shipping documents were examined to determine the method and manner in which Mahon was handling Woolworth goods going through the port for stores in Puerto Rico.

6. As a result of these conversations and on-site inspections, there was no contention raised that Mahon was doing I.L.A. work, and there was no warning or attempt to refuse to Mahon the use of containers by the members of the New York Shipping Association. The most recent visit from a representation of the I.L.A. occurred approximately two years ago.

7. On June 11, 1975 Steve L. Schulein, Manager of Staff Services for Puerto Rican Marine Management, Inc. told me in a telephone conversation that our method of operation was in violation of the CONASA rules and that starting June 12, 1975 Puerto Rican Marine Management Inc. would no longer supply Mahon Express with con-

tainers so long as we continue to operate as we now do. We could continue to use their containers only if we brought them to their terminal where I.L.A. members would strip and re-stuff the containers.

8. Later on June 11, 1975 Mahon Express was refused containers by Puerto Rican Marine Management, Inc. so long as we continue our present method of operation as described above.

I have read the foregoing, and it is true to the best of my knowledge and belief.

/s/ Matthew Mahon, Jr.
MATTHEW MAHON, JR.

STATE OF NEW JERSEY)
) ss:
COUNTY OF ESSEX)

I, MATTHEW MAHON, JR., business address, 67 Jabez Street, Newark, New Jersey, 07101, after being duly sworn state the following of my own personal knowledge:

1. I am the President of Mahon's Express. I have been employed by Mahon's Express since 1930 and have held my current position for six years. Prior to being President of the company, I was employed as General Manager, Vice President.

2. As President I am responsible for traffic, sales, and the general administration of the company. In addition to these general responsibilities, I am involved directly in the day-to-day supervision of employees. In addition to my knowledge of the operations of Mahon's Express, I also have an extensive background in motor carrier operations in the entire country. In 1955, I was the President of the Local and Short Haul Carriers Conference of the American Trucking Associations, the national organization of local and regional trucking associations. I held that position for three years. In 1965, I was President of the New Jersey Motor Truck Association. I held that position for two years. I am also a lifetime member of the Board of Directors of both of those associations. For more than 30 years I served as a rate member on the Middle Atlantic General Rate Committee. During the 1950's and 1960's I served as a member of the Executive Committee of the American Trucking Associations.

3. Mahon's Express was formed in 1905 by my father, and it remains a family-owned corporation. It is a short-haul, Class II cartage carrier. We presently serve New York, New Jersey and Pennsylvania. Attached as Exhibit A is a sales brochure describing the various services and the territories served by Mahon's Express. The current facility, located at 67 Jabez Street, is comprised of

a single building. The facility has approximately 40,000 square feet, and has room for parking approximately 100 trailers. It is entirely enclosed by Cyclone fence, and has 24-hour security. It is located approximately two miles from the Port of Newark. Attached as Exhibit B is a photograph of this facility.

4. The building at Jabez Street is T-shaped. On one side of the lower part of the T is a rail siding. There are doors along this rail siding which open at the level of the railroad car doors. Cargo is off-loaded from these rail cars and store at our facility for distribution in the New York-New Jersey area, for consolidation with other cargo for domestic shipment, or for consolidation with export cargo for shipment to Puerto Rico. On the other side of the lower portion of the T are 15 doors, also at tailgate level. Trucks back up to these doors, and their cargo is off-loaded into our storage area. This lower part of the T constitutes approximately 30,000 square feet of our storage space. The upper portion of the T constitutes approximately 10,000 square feet of space. This portion of the building is devoted solely to the consolidation of domestic and export shipments. Along the top of the T are 10 back-in spaces for trucks. Adjacent to these back-in spaces is a platform at tailgate level. Cargo is off-loaded from trucks onto this platform, moved from there to our staging area through one of the four doors adjacent to the platform, and then transported to the consignee or the pier.

5. Although the Jabez facility is the only building now operated by Mahon's Express, in the 69's and 70's the company also operated facilities located at Commercial Street, Newark, New Jersey and at the Port Authority Truck Terminal of Newark, 400 Delancy Street, Newark, New Jersey. We had 40,000 square feet of space at each of these facilities. At these two facilities Mahon's received freight, stored it and consolidated it into containers for export movement to Puerto Rico. At the Port Authority operation Mahon's utilized 30 back-in spaces for truck

trailers. At the Commercial Street facility Mahon's used approximately 24 doors.

6. Mahon's currently employs approximately 95 employees. Of these, approximately 70 are employed in the job classifications of drivers and platform men. When the company was operating its facilities at Commercial Street and Delancy Street, it employed an additional 7 or 8 platform men at each location. Mahon's also had support staff at each of these two additional locations. The drivers and dockmen employed by Mahon's are represented by the International Brotherhood of Teamsters, Local 478. In their work as platform men, employees use handtrucks, conveyors, forklift trucks, pallets, wheelcarts and other equipment for handling of freight. Almost all of the cargo handled at our Jabez Street facility must be handled by hand during some phase of the loading and unloading process.

7. I first saw the use of modern, large containers in approximately 1958. These containers were 35 feet long and were introduced by Pan-Atlantic Steamship Company. For years prior to 1958, however, Mahon's had offered to its customers both consolidation of export shipments, deconsolidation, storage and distribution of import cargo, and consolidation and direct delivery of domestic cargo to New Jersey and New York, including the five boroughs, Rockland, Orange and Nassau Counties of New York.

8. With respect to its pre-modern container domestic traffic Mahon's major customers were L. Bamberger Company, F. W. Woolworth Company, S. S. Kresge, now known as K-Mart Company, and J. Wiss and Sons, a cutlery company. For these companies, Mahon's performed local pickup and delivery services throughout the territory. For instance, a Mahon's driver would go to the five different railroad stations in Newark and pick up cargo designated for one of its customer stores. The driver would deliver the consolidated truckload of cargo to that store. The driver would then return to the rail-

road stations and do the same thing for another store. At that time, Woolworth's had 11 stores in Newark; S. S. Kresge and Bamberger's each had one store. J. Wiss had two receiving stations.

9. Between 1905 and 1922, Mahon's had no terminal. The drivers would use the railroad station as their terminal loading point. Between 1905 and 1918 all of this work was done with horses and wagons. Mahon's did not have its first motor vehicle until 1918. The driver of the horse-drawn wagon would load cargo from the railroad car to the wagon. Mahon's drivers also went to the pier area in New York to pick up import cargo destined for Mahon's four major customers. At the pier our driver would load the cargo from the back of the wagon into the front of the wagon.

10. In the 1920's the businesses of our four major customers significantly increased. Woolworth's had opened approximately 40 stores in the State of New Jersey, and a significant number of other stores in New York and Pennsylvania. Bamberger's, although still operating one store in New Jersey, had four warehouses in the state. Kresge had opened approximately 20 stores. As a result of this significant increase in business, Mahon's in 1922 built its terminal at the 67 Jabez Street location adjacent to the railroad siding.

11. At this facility, "pool cars" of cargo would be delivered to Mahon's via railroad cars. These pool cars would be shipped by one of our customers, such as Woolworth's, and would contain cargo destined to its various outlets. Mahon's employees would off-load the cargo from the railroad car into our terminal. We would then sort and segregate the cargo and load it onto our vehicle's for delivery to the designated consignees. At this time the cargo was pre-marked by our customer. When a railroad car was to be delivered to our facility, our customer would forward to us both a bill of lading covering the shipment and a manifest indicating the breakdown of stores and delivery point for each piece of cargo. In addition to this work for our retailing customers, we also performed pool car work for manufacturers. Manufacturers would deliver to us via the railroad, pool car cargo destined for many retailing chains. Again, our employees would off-load it onto our vehicles for delivery to the retailers. By this time, Mahon's had also developed additional customers. The Anchor Hocking Glass Company, as well as most other major glass manufacturing companies in the United States, were using Mahon's pool service. These companies would ship to Mahon's a pool car containing cargo destined for their retailing customers in the area. Toy manufacturers and enamelware manufacturers by this time had also begun using this service.

12. Also during the 20's, Mahon's pier work increased. Mahon's drivers would pick up import cargo at the pier and return it to Mahon's terminal for further sorting and segregation before delivery to the consignees. Although most of our pier work at this time involved import cargo, Mahon's did do some export cargo delivery. Our drivers would deliver to the pier Woolworth's export cargo bound for their stores in Cuba. Mahon's drivers would pick up Woolworth's export cargo from various manufacturing facilities within our area. The cargo would then be brought to our Jabez Street terminal where cargo for particular stores was consolidated into full truckloads. Our drivers would then deliver the full truckload bound for a particular store in Cuba to the pier. The driver would move the cargo from the truck to the tailgate of the truck, and the longshoremen would move the cargo from the tailgate of the truck onto the pier and ultimately onto the steamship. Wooloworth's obtained cheaper shipping rates by shipping full truckloads, rather than small less-than-truckloads.

13. Beginning in 1933, Mahon's obtained contract with the Pennsylvania Railroad for pickup and delivery services to and from Newark, Elizabeth, Linden, Rahway, North Arlington, Kearney, South Kearney. Mahon's ob-

tained this contract because of its relationship with the major customers of the Pennsylvania Railroad. Because of this contract, Mahon's obtained the right to pick up and deliver all cargo to the Pennsylvania Railroad. This generated a large amount of business and continued until 1956.

14. In the 1930's and 1940's, the business engaged in by Mahon's significanctly increased, but did not change in nature. Mahon's contined to make domestic pickups and deliveries, perform its pool car distribution service for import and domestic shipments, and consolidate export or domestic cargo for delivery to its customers' various outlets. In 1952, Woolworth's opened its first store in Puerto Rico. With the opening of this store, Mahon's began delivering approximately a truckload of export cargo a day to the pier for shipment to Woolworth's Puerto Rican store. This cargo came to Mahon's in various ways. On occasion, Mahon's driver picked up the export cargo at manufacturing facilities within our operating authority. Cargo also was picked up at a Woolworth's warehouse which at that time was located in the Bronx. Some of the cargo came to Mahon's terminal in the pool cars, where it would be separated from the rest of the pool car cargo for consolidation with other cargo destined to Puerto Rico. Mahon's would store all the cargo destined for the Puerto Rican store, and when it had accumulated into a full truckload, deliver it by motor vehicle to the pier.

15. Each piece of cargo delivered to the pier had to be "cubed", or measured and marked, before it could be loaded onto the steamship. This resulted from the steamship company's billing practice of charging the shipper either for density, or for weight, whichever produced the higher charge. Although our customer or Mahon's would already have measured and marked each piece of cargo before delivery to the pier, the longshoremen would reperform this task. This significantly lengthened the process of delivering cargo to the pier. As a result, de-

liveries often took up to 8 hours, and on occasion the driver would have to return to the pier with the balance of the shipment the following day.

16. Because of the delays and other expenses of making deliveries to the pier, with the increase in export traffic occasioned by the opening of Woolworth's Puerto Rican store, and shortly thereafter additional stores, Mahon's and its customers sought a way to decrease the cost in connection with the export work. In 1954 or 1955, Mahon's learned that small containers with 500 cubic feet of space were available from the Alcoa Steamship Company. These containers were used to bring mail or Army personnel household goods to the United States from Puerto Rico. However, Alcoa was having to transport the containers back to Puerto Rico empty. The savings to both Alcoa and Mahon's shipper-customer, prompted Alcoa to agree to provide containers to Mahon's with which Mahon's could ship its Puerto Rico-bound cargo.

17. Thereafter, Mahon's consolidated into these containers at its Jabez street terminal cargo bound for Woolworth's Puerto Rican stores. Each container was stuffed with cargo bound for a particular store. The containers would be loaded onto a flatbed truck at Mahon's terminal, usually three or four per truck, and delivered to the pier area. At the pier a crane would unload the container onto the pier. The driver would then return to the terminal with empty containers. These containers would be loaded by the ILA onto the steamships as a single piece of cargo. They would not be unloaded at the pier and reloaded by ILA labor.

18. Mahon's also performed some import services using containers similar to the Alcoa containers. These containers were owned by the Pennsylvania Railroad and were used by the railroad in conjunction with its import and export traffic. A company in Hoboken and Jersey City would instruct Mahon's to pick up the container at the pier and return it to its terminal. At the

terminal, Mahon's employees would unload the container and make the distributions directed by its Hoboken customers. The containers came either with or without a railroad chassis. Those that came without were loaded onto Mahon's flatbed truck at the pier by a crane. The containers on chassis would simply be hauled to the Jabez terminal as would a normal truck trailer. In either case, the ILA did not unload these import containers at the pier.

19. The small containers remained in use between 1954 and approximately 1958. At that time the Pan-Atlantic Steamship Company came into existence and began using 35-foot containers in the Puerto Rican trade.

20. With the advent of the Pan-Atlantic 35-foot container Mahon's began using the larger containers for its export shipments to Puerto Rico. Pan-Atlantic and S. S. Waterman Companies subsequently merged to become the Sealand Company, owned and operated by MacLean Industries.

21. The advent of the modern large container did not change in any respect Mahon's basic way of doing business. It continued to perform its pool car service, receiving cargo at its Jabez Street terminal either by railroad or other motor carriers. Mahon's employees would unload this cargo, segregate and sort it, and prepare it for export or domestic shipment to the consignee. In addition, about this time Woolworth's began using what it called a "warehouse invoice". A shipment from a single shipper would come to Mahon's in one truckload, but could be destined for 80 or more different stores. Mahon's would unload, segregate, sort, and mark or label this cargo in preparation for delivering it to the consignees designated by Woolworth's. Mahon's continued picking up containerloads of cargo at the pier and hauling them intact to its Jabez Street terminal. At the terminal, Mahon's employees would unload the container and either store or immediately deliver the cargo to the consignee according to Mahon's customer's instructions. Mahon's

continued to perform its domestic services including local pickups and deliveries within its operating area. It also continued to consolidate export cargo into containers, the only change being the increase in the size of the containers used. Employees, after the advent of the large container, also continued to use the same equipment at the terminal.

22. After the advent of the modern container and continuing until approximately 1970 or 1971, Mahon's performed the above-described services without interference by the ILA. Mahon's work increased, in part because it began performing work for K-Mart, the successor to S. S. Kresge. K-Mart opened its first store in 1958, and eventually increased its operation to include 8 stores. Because of the significant increase in consolidation work Mahon's opened the facilities at Commercial Street, Newark, New Jersey and at the Port Authority Truck Terminal of Newark.

23. In performing the work of consolidating export shipments and deconsolidating import shipments, Mahon's has alway worked as an agent for its customer. Woolworth's shipments are kept separate from Kresge's, and later K-Mart's, and vice versa. Mahon's customer specified the work it wished performed. Mahon's kept this relationship for various reasons. The intermingling of cargo creates billing problems, and problems with customs and declaration papers. In addition, Mahon's does not want the responsibility of being the shipper of the cargo. Intermingling of freight would require that Mahon's, rather than Woolworth's or K-Mart, be listed on the various shipping documents as the shipper of the cargo.

24. During the 1960's use of containerized shipping methods became increasingly more sophisticated. The services now performed by Mahon's at its terminal could not be performed at the pier by longshore labor. For instance, for Woolworth's and K-Mart, Mahon's actually breaks cargo down beyond cartons into individual pieces of merchandise for delivery to various stores. Examples

might include chinaware, desks, a pair of shoes, two or three writing pens and other types of merchandise. These small items are individually wrapped by Mahon's emloyees delivered to a domestic store, or packed into a container for export shipment to a store in Puerto Rico. Without containerization, these small individual pieces of merchandise could not be shipped in that form. Vessel operating common carriers have provided very detailed instructions on acceptable methods for packing and marking export cargo. Shipments such as those described would not comply with these requirements. To ship these types of items under the requirements of the steamship companies would be prohibitively expensive.

25. Containerization has had a profound impact on the freight transportation system. As indicated above, commodities not previously shipped by ocean transport can now pass to foreign locations protected by the container. An entirely new commodity mix of import and export cargo now passes over the pier. In addition, containerization has eliminated many of the risks previously inherent in ocean transport. The risks of pilferage and cargo damage have significantly decreased. Further, the risks of financial losses due to delays at the pier have decreased. Containerization has greatly increased the speed with which cargo can be loaded and off-loaded from ships and loaded and off-loaded from delivering and receiving motor carriers.

26. Containerization developed unimpeded by the longshoremen until approximately 1971. The ILA did not, until 1971, attempt to interfere with Mahon's operation. In 1971, Mike Nicholas, an employee of Sealand at that time and now of the New York Shipping Association, met with me at the terminal and informed me that we were violating the ILA's Rules on Containers. Nicholas suggested that the cargo we were loading in the containers for our various customers should be delivered to the pier for loading by longshoremen. At the time I had two loaded steamship containers in my yard which the sea carriers were refusing to handle. I agreed with Nicholas

that I would deliver the two fully-loaded containers to the pier where they would be rehandled by ILA labor and restuffed into two different containers and that I would also deliver three truckloads of cargo to the pier for the ILA to stuff into three other containers. I explained to Nicholas that the cargo would have to be packed in such a way at the pier so that the cargo could be off-loaded in Puerto Rico in the order in which deliveries to the various stores were to be made. I also informed Nicholas that the light cargo at the top of the fully-loaded containers would still have to be at the top of the container once the ILA rehandled the cargo. Likewise the cargo at the bottom of the fully-loaded containers would have to end up at the bottom of the container which the ILA intended to load. Nicholas agreed, and the two containers and three truckloads of cargo were delivered to the pier. When the ILA had completed its loading tasks, instead of five containers being shipped to Puerto Rico, the cargo had been loaded into eight or nine containers. Instead of paying for five containerloads, our customer had to pay for sea carriage of the eight or nine trailers. The ILA simply could not load the containers in the same way and in the same order that Mahon's employees could load them. I informed Nicholas of my opinion, and he disagreed. However, prior to the incident next discussed our containers were not rehandled by the ILA.

27. In 1972, we discovered that ILA labor had begun arbitrarily rehandling certain containers consolidated for export shipment at our Jabez Street terminal. The rehandling came to light because various Woolworth stores in Puerto Rico had not been receiving the cargo specified on the manifest or on the order specifying the proper method of unloading. In addition, instead of the cargo being in one container, it would often be in two containers with two different numbers and two different seals. I confronted Nicholas and other officials at Sealand concerning this practice. The general manager of the Woolworth Company also spoke with these officials concerning

this problem. The ILA ceased rehandling these containers after our discussions.

28. In 1972 or 1973 Roy C. Williams, an attorney for the New York Shipping Association, and another man who I believe was named John McDonald, Vice President of the ILA, visited me at our office at the Jabez Street terminal. They informed me that they suspected that I was violating the ILA's Rules on Containers. I asserted that Mahon's Express was merely an agent for the customers with whom we did business. I showed them that even in our facilities, Woolworth's cargo was separated by a wall from K-Mart's cargo. Each customer's cargo was handled by separate employees, and the containers were shipped under the customers' names. Williams and McDonald indicated that there would be less problems if the customer would actually pay my employees directly for the loading and unloading work. They indicated after our discussions that they would get back to me. I did not hear from these officials again, and the ILA did not attempt to rehandle containers stuffed at our facility until June 11, 1975.

29. Steve L. Schulein, Manager of Staff Services for Puerto Rican Marine Management, Inc. told me in a telephone conversation that our method of operation was in violation of the CONASA rules and that starting June 12, 1975 Puerto Rican Marine Management, Inc. would no longer supply Mahon Express with containers so long as we continue to operate as we now do. We could continue to use their containers only if we brought them to their terminal where I.L.A. members would strip and restuff the containers. Later on June 11, 1975 Mahon Express was refused containers by Puerto Rican Marine Management, Inc. so long as we continue our present method of operation as described above. After Mahon's filed a charge with the NLRB, the ILA did not continue to press these demands, and our containers passed through the port without interference.

30. The rehandling of our containers by ILA labor has until very recently, been sporadic. In the 1970's prior to

the injunction which issued in the Consolidated Express unfair labor practice proceeding, rehandling of our consolidated containers and refusals to release import containers coincided with the ILA's attempts to renegotiate its Rules on Containers. Other than these occasional interruptions, the ILA did not rehandle Mahon's export containers or refuse to turn over import containers to be delivered to Mahon's terminal.

31. In the 1970's during those periods when the ILA refused to handle containers consolidated at our terminal, Mahon's would load export cargo into railroad truck-train trailers for delivery by rail to Jacksonville, Florida. At Jacksonville, these trailers would be loaded intact onto a barge for ocean transport to Puerto Rico. At Puerto Rico the railroad truck-train trailers would be rolled off the barge and would be picked up by the customer's designated carrier for delivery to its store. The company which conducted this railroad-barge-truck-train trailer operation was Trailer Marine Transport Corporation. This company now refuses to continue this operation.

32. The enforcement by the ILA of its Rules on Containers has never resulted in the return to the pier of the consolidation or deconsolidation work performed by Mahon's at its terminal. As indicated, much of the consolidation work performed at the terminal was sent overland by the TMT railroad truck trailer operation. In addition, our customers would consolidate shipments at their own facilities rather than sending less-than-containerload shippers to the pier. Customers simply will not direct shipments to the pier for consolidation by the ILA. In addition to the prohibitively expensive packing requirements discussed above, the paperwork which would be required to document shipments from dozens of shippers to dozens of different stores in Puerto Rico would be expensive and confusing. Further the customer would have to pay the less-than-containerload rate on each of the small shipments. The effect of the ILA's prior attempts and present enforcement of its Rules has merely

been the diversion from Mahon's of much of its container business. In the 1960's and 1970's Mahon's delivered to the pier approximately 2,000 containers each year which it had consolidated at its terminal. By last year this number had decreased to 400. Our import traffic has also significantly decreased. Mahon's has ceased its operations at Commercial Street and the Port Authority Truck Terminal because of this loss of business.

33. The ILA's December 6, 1980 agreement with the vessel operating common carriers to enforce the Rules as of January 1, 1981 has impacted on our business as well. Mike Sheehan, of Puerto Rico Marine Management, Inc., contacted me on Friday, January 10th to inform us that we could no longer pick up and deliver containers to the steamship company. Since that time the sea carrier has requested us to pick up two containers previously delivered to the pier at their request. The ILA claims the containers were loaded in violation of the Rules. Our customers are continuing to divert cargo from the Newark area in order to avoid the ILA's Rules. The work formerly done at our terminal is not being shifted to the pier.

34. The process of picking up and delivering loose and containerized cargo to and from the pier has always involved a series of contracts between Mahon's, the sea carrier, and Mahon's customer. When a Mahon's driver picks up cargo at a manufacturer's or any other type of facility, the driver upon receiving the goods signs a prepared bill of lading. Attached as Exhibit C is a short-form bill of lading which is used by Mahon's as its contract for carriage with the customer. This bill of lading incorporates the terms of the Uniform Straight Bill of Lading found in the National Motor Freight classification. One provision of the Uniform Straight Bill of Lading provides:

> "No carrier is bound to transport said property by any particular schedule, train, vehicle or vessel or in any particular market or otherwise than with reasonable dispatch."

Under federal law, Mahon's is financially responsible for cargo in its possession. The provision in the Uniform Straight Bill of Lading, therefore, is necessary to give Mahon's the flexibility to determine the proper and safe method of carrier. Mahon's maintains complete control over the cargo in its possession. If the cargo is less than truckload, the driver makes other pickups before returning to Mahon's terminal. At the terminal the cargo is off-loaded from the truck, sorted and segregated for subsequent delivery to the pier or to domestic consignees. With respect to the Puerto Rican-bound cargo, Mahon's would already have received from its customer a warehouse invoice indicating how the cargo was to be consolidated and to what stores it was to be shipped. Attached as Exhibit D is a warehouse invoice. From the warehouse invoice, Mahon's makes up another bill of lading covering the shipment from its terminal to the pier. Mahon's also prepares a manifest which indicates the entire contents of a container. A manifest is attached as Exhibit E. The manifest also provides "Schedule B" numbers for identification of the commodities in the container. This is required by the steamship companies, the U.S. Customs Department and the officials in charge of excise taxes. Prior to delivery of the container or cargo to the pier, Mahon's prepares a dock receipt. An example of a dock receipt is attached as Exhibit F. A dock receipt shows the container number, the sea number, the consignee, the final destination, the carrier who is to make the delivery on the import side, the total number of pieces of cargo, the weight of the cargo, and the valuation. The manifest is attached and incorporated by reference in the dock receipt. After the driver has delivered the container to the pier and deposited in the appropriate spot in the yard, the driver is given one copy of the dock receipt as evidence of his delivery. From the dock receipt we prepare our freight bill. For import cargo, Mahon's is contacted by a broker in the port area who informs us that we are to pick up a container or other cargo. The broker supplies a delivery order which our driver pre-

sents at the pier and from which we prepare our freight bill. Our customer's agent supplies us with a Manifest with instructions for delivery of the cargo in a consolidated container. An example is attached as Exhibit G. In addition to these documents, the interchange of containers is governed by the terms of an Equipment Interchange Receipt. Such a receipt is used when the container is inspected and any damage to the container is indicated on this receipt. This receipt incorporates the terms of the Uniform Intermodal Interchange Agreement entered into by various motor carriers and vessel operating common carriers. A copy of such a receipt is attached as Exhibit E. The Uniform Intermodal Interchange Agreement provides in part:

> "User shall have the right of complete control and supervision of equipment while in its possession and shall be responsible for returning the equipment in the same condition as received, ordinary wear and tear accepted."

Once turned over to Mahon's Express, therefore, Mahon's has complete control of the container and, pursuant to federal law and its bill of lading of the cargo contained therein. Under the trailer interchange receipt, the trailer is inspected on the import side when it is removed from the pier area and on the export side when it is returned to the pier area. Mahon's Express' customers may be manufacturers, retailers or other businesses. Other than perhaps recommending our services as a motor carrier to some customer, steamship lines never directly contract for our services as a motor carrier. With virtually no exceptions, our customers contact us directly. Likewise, our customers determine what cargo will be consolidated into export containers, what import containers will be deconsolidated and what import cargo will be stored or delivered directly to a consignee.

/s/ Matthew Mahon, Jr.
MATTHEW MAHON, JR.

AFFIDAVIT

STATE OF PENNSYLVANIA)
) ss:
PHILADELPHIA COUNTY)

I, Dominic C. Marano, having been duly sworn and cautioned, state the following of my own personal knowledge and belief:

I currently am employed as President of Marty's Express, Inc. I have held this position for approximately one year. Previous to this I was employed as Vice President of the Company, and before that as Traffic Manager.

I have been employed at Marty's Express since 1962. The company began operations in 1936. My father, Martin Marano, served as President until I assumed this position. I had knowledge of the company's day-to-day operations before I began working for Marty's in 1962.

Marty's Express is a motor truck transportation company operating under I.C.C. certification in four states. The specific services provided by the company are more fully discussed below.

The company currently operates two facilities. One facility is located in Lancaster, Pennsylvania, the other at 4201 Tacony Street, Philadelphia, Pennsylvania. The facility in Lancaster is approximately 65 miles from the Philadelphia terminal.

In 1958, prior to the advent of the modern (8'x8'x20' or 40') container, the Company ran a local cartage operation. It employed approximately 15 employees in the job classifications of driver, helper, and platform worker. These employees drove, loaded and unloaded trucks, sorted, labeled and palletized cargo. Their equipment consisted of trucks, trailers, forklift trucks and binding machines. They were represented by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 107.

In 1958 the majority of our business consisted of the transporting of import cargo from the piers to department stores and manufacturers. The Company's I.C.C. authority at that time was limited to the carriage of furniture.

However, the service offered at that time was not limited to mere carriage of freight. Consignee-department store chains importing trailerloads of cargo often directed us to distribute the cargo to their various stores. Marty's would haul the cargo to its terminal, where it would unload, segregate and label it. The cargo would then be transported by Marty's or other carriers to locations identified by our customer.

Marty's also arranged for transportation by other carriers of import cargo which Marty's had transported from the pier to its terminal. Because Marty's had contact with other carriers, customers would rely on it to arrange for air or motor carrier transportation of the cargo to specified locations.

The process of picking up import cargo at the pier began with the customer or its agent, a broker or freight forwarder, contacting Marty's concerning the pickup of import cargo. The customer would usually supply us with a bill of lading, the broker with a delivery order. A delivery order is attached hereto as Exhibit A. Bills of lading are attached as Exhibit B.

After receiving either or both of these documents, the company would dispatch a driver to the pier to pick up the freight. In 1958, the "pier" consisted of a number of finger piers along Delaware Avenue. The driver would report to the guard shack on the perimeter of the pier area to obtain a pass to the terminal. The driver could not drive his vehicle inside the terminal without this pass. On the majority of occasions, trucks were backed up, and the driver would have to wait as long as one or two hours before moving inside.

During that one- or two-hour period, the driver would report to a clerk for the sea carrier company which had

transported the cargo. The clerk would verify that the driver had a document authorizing him to pick up cargo. This is the only task the driver could perform during the time spent waiting to enter the terminal. The rest of the period was "dead time," the cost of which Marty's had to absorb.

After the driver gained entry to the terminal, he would report to a checker, employed by the terminal operator. The checker would inform the driver whether Customs had inspected and released the cargo which the driver wished to pick up. If Customs had, the checker would ride with the trucker to the point on the pier where the cargo had been stacked.

In 1958, the majority of cargo was loose, noncontainerized cargo. After finding the cargo on the pier, the driver would load the cargo onto his truck. If the job was more than the driver could handle, Marty's would send a second employee along with the driver to the pier. Marty's could also pay longshore labor to assist the driver in this work. Marty's had the right to choose whether to use its own employees or ILA labor to load its trucks.

Although modern containers had not yet appeared in the Philadelphia Port at that time, some smaller boxes approximately 10 feet by 8 feet were used. These containers were introduced to preclude cargo damage and pilferage. I.L.A. labor would move these containers to the tailgate of the truck. The trucker would strip the container and load the cargo into his truck. The trucker could also haul the box on a flatbed truck back to the Marty's terminal, where the box would be stripped at its cargo transported to the consignee.

Marty's Express' only facility in 1958 consisted of an 8,000 square foot terminal with approximately 800 square feet of platform space. The terminal served in part as a garage in which the company's trucks were parked, loaded, and unloaded.

Beginning in 1962, the company leased a second truck terminal which gave it an additional 8,000 square feet

of covered dock space. By 1967 Marty's operating authority enabled it to offer short-haul freight transportation between Philadelphia and New York. The company had by that time expanded its work force to 27 employees in the job classifications represented by Teamsters Local 107.

Modern containers appeared in the Philadelphia Port in the mid 1960's. Between 1967 and 1972 containerization rapidly developed and changed the cargo transportation system in the Philadelphia port. The finger piers previously used became obsolete. Packer Marine Terminal and Tioga Marine Terminal began handling most of the port cargo. Exhibit C shows the types of cargo we handle.

Just as before containerization, Marty's Express' customers, or their agents, instructed the company to pick up freight at the pier. Delivery orders or bills of lading were supplied, and a Marty's Express driver was dispatched to the pier. Because of the increase in the amount of cargo being handled at the pier by the late 1960's and early 1970's, however, the wait outside the guard shack at the head of the pier increased to three to four hours.

After being admitted to the pier a checker would show the driver where the container was located. The checker would also inform the trucker whether Customs had inspected and released the container. Some containers were not cleared at the pier by Customs but remained "in transit" and bonded until coming to rest at some point inland. Customs would clear these containers at an off-pier location.

After finding the container on the pier, the checker would fill out a Trailer Interchange Report. An example of this report is attached as Exhibit D. This report documents the receipt by the trucker of the container, as well as the condition of the container. It, along with the Uniform Equipment Interchange Agreement, spells out the terms of the agreement under which the trucker assumes responsibility for the container.

After signing the Interchange Report, Marty's driver would leave the pier and return the container to the truck terminal or haul it to the consignee.

With containerization, Marty's also began handling export cargo. At the request of a manufacturer, Marty's would pick up the container at the manufacturer's facility and deliver it to the pier. The driver would encounter the usual delays outside the terminal, and once inside would report to the clerk for the sea carrier which was to transport the cargo. The driver would present the clerk with a dock receipt, an example of which is attached as Exhibit E. The receipt evidences the sea carrier's receipt of the cargo.

The driver would then speak with a checker who would examine the condition of the container, fill out a Trailer Interchange Report, and tell the driver where to drop the container. The driver would drop the container and return to Marty's terminal.

To return an empty container, a driver would follow the procedure with respect to export cargo. No documents would be exchanged with the sea carrier's clerk, however.

With containerization came a diversification of Marty's trucking services. In 1968 Marty's set up a warehouse operation in Camden, New Jersey, to handle containerized cargo imported by Action Industries. The warehouse operated under the name Marano Enterprises. Action was at that time importing large quantities of merchandise for distribution to various retail stores. The merchandise was imported in full container loads.

Marty's Express drivers would pick up containers at the Philadelphia piers and transport the containers to the Marano Enterprises warehouse. The containers would there be stripped by Marano Enterprises' Teamster employees and the cargo stored for distribution. In accordance with Action's instructions, Marty's released most of the cargo within 30 days of its initial storage. The cargo was transported from the warehouse by Marty's trucks and other motor truck operations.

Marty's provided a much more efficient service to Action than could have been offered by sea carriers or pier terminal operators. Because the cargo was containerized, it was not exposed at the pier to damage or pilferage. Cargo also did not have to be loaded into the truck trailer at the pier. The driver simply hauled the fully loaded container to Marty's warehouse. Had the terminal operator attempted to offer this warehousing service, each time Action would have wanted cargo released, a motor carrier would have had to face the delays and expenses inherent in picking up cargo at the pier.

The volume of cargo handled at the warehouse was so significant that the I.L.A. inquired at the warehouse facility about the nature of our operation. I explained to the I.L.A. officials that we were running a basic warehousing operation. No action was taken against Marty's Express or Marano Enterprises by the I.L.A. with respect to the warehouse facility. I operated this facility until approximately 1970.

Marty's performed on a smaller scale a similar service for other customers. A customer would ask Marty's to distribute part of the cargo in a container and hold the rest of the cargo until further instructions. Marty's would later release and deliver the cargo as instructed.

With containerization, employees in the driver, helper and platform worker job classifications continued to perform essentially the same work as they performed when Marty's handled only loose cargo. Truck trailers were loaded and unloaded. Cargo was segregated, palletized and labeled. The volume of work, however, continually increased.

By 1972 Marty's employed 95 persons in the job classifications represented by Teamsters Local 107. It had also begun leasing a two-acre terminal with 15,000 square feet under roof at 2335 Wheatsheaf Lane. Adjacent to the terminal was a railroad siding. Attached as Exhibit P is a photograph of this facility.

Marty's I.C.C. operating authority had not changed since 1967. Although Marty's continued to perform

freight transportation services, an increasing percentage of its work related to containerized cargo movements. By 1972 approximately 53 percent of the general cargo which Marty's picked up at the pier was in containerized form. As of 1972 Marty's handled only full shippers load containers, containers filled with the cargo of one consignee.

By 1972, many manufacturers and department stores were using Marty's as a distribution arm. Cargo in a full shipper's load container consigned to an area department store chain would have to be delivered to ten different stores. Marty's would strip the container at its truck terminal, sort and label the cargo, and deliver the appropriate amount to each of the facilities.

Some such department store chains operate warehouses. For these chains Marty's would either perform the service described above or deliver the container to the warehouse where Marty's employees would strip the container for storage of the cargo. In many cases the cargo would not be warehoused for thirty days.

Marty's would also strip full shipper's load for reasons of economy. When a full shipper's load was destined to an area around which Marty's had to make another delivery, Marty's would not haul a 20-foot container to the consignee, return to the terminal, and make another trip to the same location. It would strip the 20-foot container of its cargo and consolidate into its own equipment that cargo and the cargo going to another consignee in the same area.

Similarly, if Marty's knew that it would have to make a backhaul in an amount filling a conventional trailer, it would not haul a 20-foot container to the location and return with half of the backhaul load. It would strip the 20-foot container of the cargo, load it into a conventional trailer, and make the delivery. It could then return with the full backhaul load.

In most circumstances Marty's will not break a container's seal without the customer's permission. Upon the

breaking of the seal, Marty's can be held liable for any deficiencies in the merchandise supposedly in the container. When Marty's acts as a customers distribution arm, it breaks the seal with the customers permission. On some occasions Marty's will strip a container for efficiency reasons without seeking authorization from the customer.

Throughout the 1970's containerization continued to increase in the Philadelphia Port area. In 1975 Marty's opened its facility in Lancaster, Pennsylvania, where it currently employs ten persons in the job classifications of helper, driver and platform worker. These employees are represented by Teamsters Local 771.

In 1978 Marty's moved its Philadelphia operation to its present location at 4201 Tacony Street. This facility has 30,000 square feet under roof and sits on a ten-and-one-half-acre lot. Photographs of the Tacony Street facility are attached hereto as Exhibit F.

By 1978 Marty's employed 130 employees in the job classifications represented by Local 107 at the Tacony Street facility. Although Marty's I.C.C. operating authority has not changed, it has applied for operating authority in eight additional states. This authority was granted by the I.C.C., but is currently under appeal by competing carriers.

Marty's performs a large volume of container work performed as is evident from its 1979 statistics. In 1979, Marty's hauled 10 million pounds of import general break bulk cargo from the pier. Ten percent of this amount was in the form of noncontainerized break bulk cargo. Ninety percent of the break bulk cargo was containerized. Eighty percent of the import containers were full shipper's loads. Fifteen percent were less than container loads. Five percent of the full shipper's loads were stripped by Marty's at its Tacony Street terminal. Twenty-three to twenty-four percent of the full shipper's loads were delivered to a warehouse for an area department store. These containers were stripped at the warehouse by Marty's employees, and much of the cargo was released within 30 days. All

of the less than container loads were stripped by Marty's at its facility.

On the export side, Marty's hauled 2,350,000 pounds of general break bulk cargo. Some of this cargo went to the Philadelphia pier, and some to the railroad yard for transport, via the land-bridge system discussed below to the port of Seattle. Of the total amount 47 percent was noncontainerized and 53 percent containerized. Sixty-six percent of the containers were full shipper's loads, and 34 percent less than container loads. All of the full shipper's loads went to the pier. All of the consolidated loads went to the railroad yard. Although Marty's did not stuff any of the export full shipper's loads at its Philadelphia terminal, 100 percent of the export less than container loads were stuffed by Marty's at its Philadelphia facility.

With containerization Marty's continued to diversify the services it offered. In 1976, American President Lines ("APL"), a sea carrier, began operating a land-bridge container transportation system. Because American President Lines has no port of call on the East Coast, it brings import cargo to the West Coast port in Seattle and ships containers across the country on piggy-back railroad cars.

APL land-bridges both consolidated and full shipper's load containers. Marty's picks up these containers at the railroad yard in Philadelphia and brings them to its Tacony Street terminal. The full shipper's load containers are delivered intact to the consignees by Marty's truck terminal. Marty's segregates and labels this cargo and either distributes it itself or holds it for distribution by other motor carriers. APL instructs us as to the proper handling of all of its containers.

Marty's also stuffs consolidated containers for APL. Various manufacturers and carriers contact Marty's when they have loose APL cargo to be picked up or delivered to Marty's. Marty's consolidates this loose cargo into containers and transports the containers to a Philadelphia railroad yard. APL communicates with Marty's to determine the number of "stuffers" ready for shipment,

but does not contact Marty's to instruct it to pick up loose cargo. Manufacturers and carriers directly contact Marty's to inform it that the loose cargo is available for pick up by Marty's or will be delivered to Marty's.

Marty's continues to act as a distributor of the products of area department stores. This service has been facilitated by Marty's providing office space for Customs officials at its Tacony Street terminal. Cargo not cleared at the Philadelphia pier and remaining "in transit" is cleared by customs officials at Marty's terminal. Because the cargo is not cleared at the pier it can be more quickly moved to Marty's terminal for distribution.

Because of the volume of traffic and the limited pier space, picking up import containers at the pier or returning containers to the pier remains a time-consuming procedure. Delays of up to eight hours are frequently encountered. These delays have so increased the cost of pier container work that certain of the work does not even produce a profit.

Marty's administrative structure consists of a president, a vice president, a dispatcher, a dock supervisor, a traffic manager, a trailer control person, and an import clerk. The vice president supervises the five latter individuals.

The import clerk is responsible for all work relating to the APL land-bridge system. The clerk must see that containers are picked up at the railroad yard. He also makes certain that distribution of cargo occurs in accordance with APL's instructions. The clerk also coordinates the consolidation of loose cargo for APL.

The trailer control employee is responsible for all appointment times, deliveries, pier Customs problems, and other problems relating to the proper delivery of cargo.

The dispatcher is responsible for assigning drivers to pickup and deliveries.

The dock supervisor supervises the loading and unloading of all freight, including containerized freight.

The traffic manager formulates and files tariffs with the proper government agencies.

Enforcement of the Rules as currently written would at least hinder and probably eliminate Marty's ability to offer various services now offered its customers. The consolidated container loads stripped and stuffed by Marty's for American President Lines would fall within the Rules. The Rules would require that these containers be stuffed and stripped at the pier, and the delays inherent in pier work would be intolerable to APL's operation.

Similarly, full shipper's loads stripped by Marty's for subsequent distribution according to the consignee's instructions, and for other efficiency reasons, would also fall within the Rules. All of these containers would have to be stripped at the pier. Marty's employees would have to pick up the loose cargo at the pier, return to the Tacony Street terminal, unload the cargo, consolidate it into trucks with other cargo destined for the same areas and only then make delivery. The handling of this volume of loose carge at the pier would undoubtedly increase the already intolerable delays. This, along with rehandling at the truck terminal, would triple the cost of carriage.

The Philadelphia pier terminals have insufficient amounts of covered storage space to accommodate the volume of loose cargo which would result from enforcement of the Rules. The terminals have not been developed with an eye toward handling of large volumes of loose cargo. At the Packer Avenue Terminal, for instance, one transit shed has been demolished to make room for a new 375-ton container crane. The City's efforts to purchase and develop additional land for the Tioga Terminal have been blocked by the Environmental Protection Agency and other regulatory agencies.

If Marty's Express customers preferred that their containers be stripped or stuffed at the pier, they could now choose that service. They have chosen instead to have their containers stripped or stuffed at Marty's truck terminal. The service offered by Marty's and other truck-

ing companies is more efficient than any such service which could be offered by the sea carriers or terminal operators. Enforcement of the Rules would eliminate these efficiency grains, and would prevent our customers from specifying that we perform the stripping and stuffing work.

The bills of lading attached as Exhibit B are contracts between Marty's Express and its customer. Section 2(a) of the bill states:

> "No carrier is bound to transport said property by any particular schedule, train, vehicle or vessel, or in time for any particular market or otherwise than with reasonable dispatch."

Unless the customer contracts otherwise, Marty's has the contractual right to choose the 'vehicle' in which it will transport a customer's cargo. This right is essential because the carrier is responsible to its customer for losses occurring to the cargo while in the carrier's possession and control. The carrier must have complete control over the cargo while in its possession.

Under the terms of its contract with sea carriers, Marty's Express also has complete control of containers in its possession.

Under the terms of its contract with sea carriers, Marty's Express also has complete control of containers in its possession. The Trailer Interchange Report states that the lessee of the container:

> "3.6: Shall have complete control and supervision of such trailer while in its possession; and the Lessor shall have no right to control the detail of the work of any employee or agent operating or using said trailer during such time. Any person operating, in possession of, or using said trailer after the signing of said receipt and inspection report and until such form is signed returning the trailer to the Lessor is not the agent or the employee of the Lessor for any purpose whatsoever."

In addition to the control outlined in the Trailer Interchange Report, Marty's is a signatory of the Uniform Equipment Interchange Agreement. This agreement includes the same provision on the trucker's complete control over the container as is contained in the Trailer Interchange Report. These provisions are required by I.C.C. regulations to be included in such equipment leases.

Despite Marty's control over both the cargo and the container while in its possession, in most instances it does not choose to exercise its right to open a container without first obtaining a customer's permission. All container are sealed by the shipper. By breaking the seal the carrier accepts responsibility for deficiencies in the amount of the cargo supposedly packed in the container or for damage to the goods. Thus, most stripping and all stuffing is performed only at the customer's instruction.

The customer may also contract for the right not to have the container opened by its carrier. Under a tariff filed by Marty's Express with the I.C.C., a customer can also choose to have "exclusive possession" of a container. Although the customer pays an additional amount for this service, under the tariff neither Marty's nor any other carrier may break the seal on the container or remove its contents. The container must move intact to the ultimate consignee.

The delivery order forwarded to Marty's by its customers, broker, or freight forwarder has no effect on Marty's control of the cargo or the container. The order is merely an acknowledgment that a bill of lading has issued. The bill of lading controls Marty's contractual relationship with its customer.

Further, I sayeth not.

/s/ Dominic C. Marano
DOMINIC C. MARANO

AFFIDAVIT

STATE OF NORTH CAROLINA

COUNTY OF GASTON

I, J. S. McCallie, business address, P.O. Box 697, Cherryville, North Carolina 28021, after being duly sworn state of my own personal knowledge and belief the following.

I am employed by Carolina Freight Carriers Corporation (CFCC or Carolina) in the capacity of Director of Commerce, a position I have held since July 4, 1974. My duties include: handling motor carrier extension matters, either as an applicant or as a protestant, before the Interstate Commerce Commission and various state regulatory bodies; meeting with personnel from the traffic, operations, and sales division of Carolina to discuss the overall operations of the company and to answer queries concerning ICC and Federal Maritime Commission rules, regulations, and proceedings; personal responsibility for publishing individual tariffs for CFCC, including the company's non-vessel operating common carrier (NVOCC) tariff; and analyzing expansion alternatives (i.e., both public convenience and necessity applications before the ICC and the purchase of operating authority from existing motor carriers).

I am familiar with Carolina, its operating authority, services, facilities, equipment, and personnel. I have been admitted to practice before the Interstate Commerce Commission.

Carolina is a motor common carrier authorized to transport general commodities, subject to the usual exceptions, in accordance with its certificate of public convenience and necessity issued by the ICC in Docket MC 2253 and Subs thereto. CFCC conducts motor carrier operations primarily of a 14,756 mile network of regular routes in 22 states and the District of Columbia serving

points generally bounded by Boston, Massachusets in the Northeast, Milwaukee, Wisconsin in the Midwest, and Key West, Florida in the South. Carolina also holds various authorizations permitting irregular route and specified commodity carriage to serve all points in several of the South Central states.

Pursuant to its philosophy to provide desirable transportation services to its customers, our company established a separate NVOCC division which commenced operation in December of 1979.

Basically, an NVOCC consolidates less-than-containerload (LCL) cargo in full containers which are subsequently tendered to vessel operating common carriers (VOCC's) for ocean transportation. In conjunction with its NVOCC service, Carolina: provides motor transportation of goods overland from and to port areas; assembles and consolidates small shipments into larger containerloads, then transfers the container to a VOCC for shipment overseas; picks up the containers at the overseas port and delivers them to a terminal for breakdown and rerouting; expedites transportation of small shipments; provides regularity of service; assumes single carrier responsibility to shippers; publishes a tariff and issues bills of lading; prepares waybills, bills of lading, and manifests; collects through charges; and furnishes fast routing and tracing of shipments. An NVOCC offers to its customers all services necessary to move cargo from the consignor's establishment to the ultimate consignee's establishment.

An NVOCC operates under authority of the Federal Maritime Commission and holds itself out to provide LCL service as does a vessel operating common carrier, such as a steamship line. However, NVOCC's do not operate seagoing vessels.

I will note at this juncture that CFCC's NVOCC operations are presently restricted to the carriage of traffic between the United States and Puerto Rico. Hereafter all references to Carolina operations will relate solely to

its NVOCC service, except where our motor carrier operations are specifically identified.

As required by the FMC, our company filed a tariff with the Federal Maritime Commission covering the details of the service we offer. This tariff, approved effective December 17, 1979, is attached hereto as Appendix A.

The tariff includes various rules, regulations, and rates we are permitted to charge in conjunction with the NVOCC services CFCC offers as identified in the tariff.

On page 13 of the tariff is found a specimen of the short form through bill of lading we use to establish the agreement for carriage between Carolina, operating both as a motor common carrier and an NVOCC, and our shipper/customer. The "Terms and Conditions of Carriage" section of the tariff, pages 14 through 16, is incorporated by reference into the bill of lading forms as a part of the contract.

Our shippers/customers may be manufacturers, jobbers, distributors, warehousers, retailers, or any individual or corporation wishing to ship freight whether or not they are the beneficial owners of such goods. About 90% of our NVOCC business is for export and the rest is for import. Other than perhaps recommending our services as a consolidator to some customer, steamship lines never directly contract for our services as a consolidator/shipper. With virtually no exceptions, our customers contact us directly and request CFCC's service on either an import or export basis between the United States and Puerto Rico.

When our customer contracts for shipment of cargo from an inland point to a location in Puerto Rico our bill of lading, as shown on page 13 of the tariff (Appendix A), is used to describe the contract of shipment. Carolina is responsible under this bill of lading and our tariff to haul the cargo from the customer's establishment to our NVOCC consolidation terminal for subsequent movement to a port in the United States, thence for the movement by sea to Puerto Rico.

In the majority of cases, the shipper specifies the port through which the cargo will be exported, and in some isolated cases that decision is left to us. We perform NVOCC activities at our regular surface transportation terminals within 50 miles of the following ports: Elizabeth, New Jersey; Baltimore, Maryland; and Jacksonville, Florida. In every instance, Carolina selects the steamship line we wish to use to transport our NVOCC shipped cargo. The ocean VOCC becomes our subcontractor for the sea movement and performs only those services for which we contract in the bill of lading. A copy of a representative short form ocean bill of lading is attached hereto as Appendix B.

In all cases the cargo that we ship as an NVOCC is tendered to the ocean VOCC in an intermodal cargo container or one of CFCC's own trailers.

Our customers, virtually without exception, use our NVOCC services to ship LCL, shipments. We consolidate such cargo from several shippers into full containers or trailers at our terminal facilities in Linden, New Jersey, Elkridge, Maryland, and Jacksonville, Florida. These full containers or trailers are then shipped on an ocean vessel at a lower rate than would be paid to the VOCC for hauling the less-than-containerload of cargo, either as breakbulk or as a load consolidated at the port terminal by the steamship line. Our consolidated full containers or trailers are shipped at a VOCC rate designated "freight, all kinds." The freight, all kinds rate is offered to us by the VOCC regardless of the contractual agreements we have with anyone. We desire and intend to have our employees stuff the cargo of our customers into containers that we lease, or trailers we own, and to likewise deconsolidate those containers or trailers at our own terminals without the ocean VOCC's or the I.L.A. infringing upon these rights.

Our terminal facility hourly employees who consolidate and deconsolidate the cargo and our truck drivers are represented by various locals of the International Broth-

erhood of Teamsters union. If we could not operate our terminal facilities as NVOCC stations because of the I.L.A. rules on containers, this would prevent us from performing NVOCC service at these points.

Attached hereto as Appendix C is a chart showing the history of our NVOCC movements for the first three quarters of 1980. The column marked "CFCC TRAILERS" indicates the number of trailers owned by Carolina which, like containers, were stuffed or stripped at our U. S. terminals by Carolina employees. These trailers hold general cargo of all kinds, indistinguishable from that shipped in containers. They are stripped and stuffed by the same Teamster employees who work on the containers. These Carolina road trailers are shipped by our NVOCC division as a part of its services, in the same manner as containers. The trailers are shipped on an ocean-going vessel similar to a container ship, commonly known as a roll-on, roll-off ("RO-RO") ship. We decide, based on consolidation of equipment availability, economies of scale, volume requirements, capital investment return factors, and equipment on location needed, whether we will ship consolidated NVOCC loads in our trailers or containers. We obtain containers from ship line companies, but we own our own trailers.

It appears from our reading of the rules on containers that stripping and stuffing our own trailers would be treated in the same manner as our stripping and stuffing of containers obtained from steamship lines.

Further, I saith not.

/s/ J. S. McCallie

CAROLINA FREIGHT CARRIERS CORPORATION

TARIFF FMC-F NO. 1

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Effective Date	
December 17, 1979	
Correction No. 1	

BETWEEN: CARRIER'S TERMINALS AT U.S. ATLANTIC PORTS AS DESIGNATED ON PAGE 4

AND: CARRIER'S TERMINAL IN PUERTO RICO AS DESIGNATED ON PAGE 4

SECTION 1 — RULES AND REGULATIONS — RULE

SHIPMENT DEFINITION — 43

Except as otherwise provided, a shipment is defined as one lot of freight received from one shipper at one point of origin, at one place, at one time, on one bill of lading, to one consignee at one point of destination.

SHIPPER'S LOAD AND COUNT — 44

When carrier-supplied trailers or containers are loaded by shipper or shipper's agent, carrier will accept said shipment subject to "Shipper's Load and Count" and the bill of lading shall be so claused. Bills of lading so claused shall be governed by the following terms to which shipper and consignee agree in advance:

A. Carrier will not be held responsible either directly or indirectly for damages to cargo resulting from improper loading or mixing of articles in carrier's trailers or containers, or any discrepancy in the count of or damage to articles.

B. Shipper shall be held responsible and agree to pay for any damage to or repairs of or replacement of trailer or container supplied by carrier for loading by shipper, in the event of damage to or total loss of trailer or container due to improper stowage of cargo by shipper in said trailer or container.

C. Shipper agrees that no explosives, ammunition, or hazardous cargo shall be loaded into trailers or containers supplied by carrier for loading by shipper.

D. Shipper shall furnish carrier with a list of contents showing a description of the goods loaded into carrier-supplied trailers or containers, together with cubic measurements and gross weight of cargo loaded by shipper. Carrier reserves the right to open and inspect the contents of the trailer or container.

E. When a trailer or container loaded with goods moves subject to "Shipper's Load and Count," consignee or its agent must furnish carrier with a clean receipt prior to release of the trailer or container or contents thereof to the consignee or its agent.

SPLIT SHIPMENTS AND CONSOLIDATIONS — 45

When carrier, because of government regulations or for any other reason, is forced to or desires to load a shipment into more than one trailer or container, the carrier reserves that right. Also, the carrier reserves the right to effect whatever splitting or consolidation of a shipment it deems most advantageous in order to make the most efficient use of its equipment.

For explanation of abbreviations, reference marks and symbols, see page [illegible].

SYNOPSIS OF NVOCC TRAFFIC TRANSPORTED BY CFCC BETWEEN THE UNITED STATES AND PUERTO RICO JANUARY 1, 1980—SEPTEMBER 30, 1980

United States Port	Shipments	Weight (Pounds)	Containers	CFCC Trailers
Baltimore, Maryland	3,152	6,378,990	113	52
Jacksonville, Florida	4,675	13,124,862	248	88
Linden, New Jersey	718	1,083,019	32	5
Totals	8,545	20,586,871	393	145

AFFIDAVIT OF JOSEPH E. McCARTHY

April 6, 1974

JOSEPH E. MCCARTHY, being duly sworn, deposes and says:

That I reside at 8 Stony Wood Road, E. Setauket, Long Island 11733. I am currently employed by the Town of Brookhaven, Long Island, New York, as a driver for the Sanitation Department. I am currently a member of the Retired Teamsters of Local 807, having left active membership in the IBT in September, 1966.

I began my employment in the trucking industry in 1934 when I joined Hasman & Baxt as a wagon boy.

Subsequently, in approximately 1937, I became a full-time driver for Hasman & Baxt. At this time, Hasman & Baxt was a general cartage company, specializing in export/import trucking work and warehousing. At this time, all trucking, warehousing and garage personnel at Hasman & Baxt were members of Local 807, I.B.T.

My duties as a driver consisted of picking up freight at various places within the metropolitan New York area, consolidating full truck loads from such pick ups, and delivering such loads to various piers. Upon arrival at the pier, I would deliver my truckload, dropping individual lots of cargo at each port mark on the pier for which I had a shipment. During this time I always unloaded such export shipments at each port mark by myself.

Similarly, in picking up cargo, I would drive to the appropriate section on the pier and load my truck. Public loaders, paid for by Hasman & Baxt (utilizing a ticket/reimbursement system) would assist me in loading my truck. I might load from several different piers, in order to consolidate a full truck load, which I would then distribute either to other piers, to railheads, or to warehouses, including the Hasman & Baxt warehouse.

Often I would go to various locations, including railheads, piers and warehouses and pick up freight for a sailing either a few days or a few weeks away. This cargo would be dropped at the Hasman & Baxt warehouse. On subsequent days, I or other Hasman & Baxt drivers might pick up additional cargo for the same sailing. All of this cargo would be consolidated at the Hasman & Baxt warehouse. Shortly, before the sailing, I or other Hasman & Baxt drivers would load the consolidated freight into a truck and deliver it to the pier. I am personally familiar with other import-export firms that were performing similar consolidation functions during this period such as J. A. Patterson, Theodore Ficke and Amadel.

In 1940, I joined the United States Army, serving with the army until 1945. I received an Honorable Discharge.

In 1945, I resumed my employment as a truck driver with Hasman & Baxt. Shortly thereafter my primary duties changed to warehouse foreman and assistant dispatcher, although I occasionally drove a truck. My duties as dispatcher, however, resulted in my being on the piers over a third of my time in order to expedite the movement of freight on and off Hasman & Baxt vehicles.

Sometime in the late 1940's, Mr. John Baxt, President of Hasman & Baxt, told me that we were going to be moving and handling our Puerto Rican freight in a more streamlined fashion. This service would be an express operation conducted in cooperation with the Valencia Trucking Company in Puerto Rico and would be called Valencia-Baxt Express.

Shortly after World War II, some shipping lines in the Puerto Rican trade began to use 7 foot containers, also called "Dravo" boxes.

The service which we were providing was to use these containers to expedite the traditional consolidation function performed both on our trucks and at the Hasman & Baxt warehouse. For the first few sailings on the Bull Line (not more than ten) with this new service we would

consolidate shipments to "Val-Baxt", San Juan into single lots, with a single dock receipt, a single bill of lading and a single consignee and deliver the lot to the Bull Line pier for a particular sailing. However, during this limited period, completely loaded Dravos which had been packed at the Hasman & Baxt warehouse were delivered directly to the Alcoa Lines pier for shipment because Alcoa had equipment available which could be used to lift loaded boxes off our trucks.

On northbound shipments via Bull Lines, during this same period (1949), we would send a driver and a helper, plus such additional men as needed to the piers to unload the contents from the Dravo boxes onto Hasman & Baxt trucks when equipment was not available to lift the loaded boxes onto our trucks. For this process, drivers would hire public loaders to assist him and/or his helpers and pay them with tickets which Hasman & Baxt would redeem later for cash.

Not later than 1949 all of the steamship companies obtained the necessary equipment for hoisting containers directly from the pier onto Hasman & Baxt flatbed trucks. To the best of my knowledge, the Alcoa Line was the first company to have such hoist equipment available. Subsequently, but not later than 1949, the Bull Line also had such hoist equipment.

By 1950, Hasman & Baxt was using flatbed trucks, flatbed trailer trucks and rack body trucks to pick up and deliver containers to the piers. The rack trucks were used only to transport 7 foot containers. The flatbed trucks were used to transport either two Dravo (7 foot) containers or a single 16 foot container. 16 foot containers were, to the best of my recollection, introduced in not later than 1950 or 1951 by the Bull Lines. The flatbed trailer truck was capable of transporting 2 16 foot containers or 3 or 4 7 foot containers.

The containers were hoisted directly aboard the trucks by pier personnel without breaking the seal. The container was then transported by Hasman & Baxt trucks

to the Hasman & Baxt warehouse. The containers were shipped on a single bill of lading to a single consignee which was Valencia-Baxt in either New York or San Juan.

Upon arrival at the warehouse, the contents of the container would be unloaded by platform personnel and stored in the warehouse pending delivery by other trucks to Valencia-Baxt Express customers. On some occasions, the contents would be reloaded immediately onto Hasman & Baxt delivery trucks with no storage involved.

On southbound shipments, individual lots would be picked up by Hasman & Baxt trucks or deliveries would be received by Hasman & Baxt, at its warehouse, from outside truckmen and the freight consolidated, at its warehouse, into full container loads. These loaded containers would then be driven to the pier for a particular sailing. Normally, we would immediately load emptied northbound containers with pick-ups or freight received on that or previous days and immediately dispatch the loaded container to the pier.

Our competitor for this consolidation of north and southbound Puerto Rican freight was Puerto Rican Express, Inc. The drivers and warehousemen for Puerto Rican Express were represented by Local 807, I.B.T.

Pick-ups from our customers frequently included so-called "straight loads." Such loads would involve shipments by a single customer of Valencia-Baxt Express which would completely fill a container. Examples of customers frequently shipping straight loads via Valencia-Baxt during the 1950's were: Playtex, IBM, Bargaintown Stores, Burnel Hankerchief Co. and Lowengart Co. On occasion, we would consolidate full container loads for a single ultimate recipient or consignee although there may have been several parties shipping through Valencia-Baxt Express to the single recipient. Similarly, single shippers might ship a consolidated load through Valencia-Baxt to a series of ultimate recipients. Valencia-Baxt would make door-to-door deliveries (through Valencia-Express) to these recipients in Puerto Rico.

These procedures and practices continued until sometime in 1957 or 1958. At that time, Sealand (then called Pan Atlantic, I believe) introduced 35 foot trailers. These trailers had detachable chassis provided by the steamship company. As a result, we only needed to provide a tractor which would hook into the trailer at the pier or warehouse and pull it to its destination.

During this period (1958-1962) Valencia-Baxt owned no trucks or tractors of its own. It used the trucks and tractors of Hasman & Baxt exclusively. All Hasman & Baxt trucks were clearly marked as Hasman & Baxt trucks.

During the 28 year period I worked with both Hasman & Baxt and Valencia-Baxt Express (through February 23, 1962) at no time was I aware of any demand by the ILA or anyone else which might interfere with the consolidation work which was performed by Hasman & Baxt or Valencia-Baxt Express or with the off-pier use of containers by consolidators. I never heard of any claim made by the ILA that they had the right to load our containers or in any way rehandle them at the pier.

I have no knowledge that, from the 1940's until February 23, 1962, any container consolidated by Valencia-Baxt was ever "stripped and stuffed" by ILA deepsea labor or anyone else. I believe that if such "stripping and stuffing" had occurred, I would have known about it because I would have received information from San Juan that the shipment had been rehandled or would have noticed personally (on northbound shipments) the effects of such rehandling. Also, believe that if there had ever really been any dispute with the ILA I believe ILA members would have refused to let us pick up or deliver our containers at the piers. At no time during the period from the late 1940's until 1962 did we ever fail to obtain containers because of ILA demands; ILA members and clerks never refused to receive our containers; and to the best of my knowledge, no restrictions in the handling of our containers existed.

Sometime during December, 1961 Hasman & Baxt sold its warehousing and trucking business to the U. S. Trucking Corp. Thereafter, U. S. Trucking provided Valencia-Baxt with the drivers and platform personnel previously provided by Hasman & Baxt. The personnel employed by U. S. Trucking to perform services for Valencia-Baxt Express were essentially the same personnel who had been employed for the same purposes by Hasman & Baxt. They continued their affiliation with Local 807, I.B.T. The other personnel who had worked the Valencia-Baxt operation prior to the sale of Hasman & Baxt continued to fill the same position after the sale of Hasman & Baxt trucking operation to U.S. Trucking. These persons included Roy Jacobs and Harry Goldstein.

I left U. S. Trucking later, on February 23, 1962. I have never since that time had any financial or employment relationship with Valencia-Baxt or Consolidated Express.

I have read the above 6 page affidavit and do solemnly swear that it is true to my knowledge and belief.

(Sworn to by Joseph E. McCarthy, April 6, 1974.)

AFFIDAVIT

COMMONWEALTH OF VIRGINIA

CITY OF VIRGINIA BEACH

I, Robert W. McCleskey, 1665 Lake Christopher Drive, Virginia Beach, Virginia 23464, after having been duly sworn state of my own personal knowledge and belief state the following.

I am and have been District Manager of the truck terminal owned and operated by Carolina Freight Carriers Corporation located at 5729 Bayside Road, Virginia Beach, Virginia 23455, from 1970 to the present, except for the period of March 1976 to October 1979 when I was Terminal Manager of the Greensboro, North Carolina terminal. The Virginia Beach terminal is within 50 miles of the Port of Hampton Roads. Carolina Freight has operated from a terminal in the Hampton Roads port area since at least 1969. Prior to that, we had a local cartage company which acted as our agent in the port area.

Carolina Freight operates from approximately 92 terminal facilities throughout the eastern, midwestern, and southeastern portions of the United States. A copy of our primary service points map is attached as Appendix A.

Carolina Freight is considered a long-haul freight company operating in interstate commerce. We do not operate intrastate in the State of Virginia or in most other states. Nor do we operate in Virginia in any local cartage capacity; we make no pickups in the local area for delivery in the local area.

Our Virginia Beach terminal freight dock hourly employees and local drivers are represented by Teamster's Union Local 822. The union agreement covers general freight drivers, drivers' helpers, dock workers, checkers, and other similar jobs. The scope of jurisdiction of this

contract unit is 75 miles from the zero point in the terminal city. Local drivers are, by contract, not permitted to perform long-haul road work, except in very limited situations. We have no long-haul drivers headquartered in our facility. They are covered by the National Master Freight agreement and various conference riders.

Any freight we pick up in the port area, from the sea terminal or other locations, must be brought to our terminal by local drivers. Whether the freight is transferred to another truck at the terminal or the trailer is simply hauled out of the area, there must be an exchange of local for long-haul drivers before the freight can move from our terminal. A reverse procedure is followed for freight hauled from outside the state to the port area.

Our freight terminal consists of a small office area which houses management, clerks, and dispatchers. A freight dock is attached, the floor of which is the height of a tractor trailer truck bed. We have 20 doors at our dock which is 7,750 square feet in size. A photograph of the loading dock area and some of the doors is attached as Appendix B. Attached as Appendix C is a photograph of a power driven fork lift truck, various hand trucks and carts, and freight waiting to be shipped. Appendix D is a photograph showing two of our employees loading some freight into a truck.

We warehouse no freight at our facility. Virtually all freight coming to our terminal is dispatched from our terminal within 12-24 hours.

In the year 1979, we handled freight imported through the seaport terminals in Hampton Roads of approximately 4,000 metric tons. We handled freight to be exported in the amount of 2,000 metric tons. Total import/export freight handled last year was in the vicinity of 6,000 metric tons.

In 1979 we hauled 146 containers from the seaports. Ninety percent of these containers were hauled from the seaport filled with import cargo. The remaining 10% were hauled empty from this port to our terminal or

inland to the premises of a shipper. About one-half of these empty containers are stuffed by our employees at our terminal with full loads of a shipper's cargo to be exported. The containers are then hauled back to the ports for shipment as a full shipper's load container. We consolidated no less than full shipper's loads at our facility for export.

At least 90% of the containers we handled were 40-foot containers; the balance were 20-foot containers.

We stripped at our terminal 28 of the outbound containers. All of the cargo from these containers was transferred to Carolina Freight road equipment and hauled in interstate commerce outside of Virginia. We estimated that the containers averaged 30,000 pounds of cargo each. This means that approximately 1,987 metric tons were handled in the 146 containers; and 382 metric tons were stripped from the 28 containers. The total percentage of cargo hauled in containers was approximately 20% of the total general cargo we handled in 1979.

Our customers for inbound container traffic are either consignees who are receiving the container shipment or Customs House brokers who are acting as agents for the consignees. For import shipments the consignee directs the shipper to send the cargo to a particular seaport and notify a particular broker or agent when it arrives. The broker or other agent then selects Carolina Freight or some other trucking company, or the consignee specifies the motor carrier to pick the container up and haul it to his premises.

The containerized cargo is shipped pursuant to a certain tariff rate. It is my understanding that a full container load of cargo is shipped across the ocean at a lower rate for container movement than the same cargo would cost if shipped in break-bulk form not containerized. Therefore, since the shipper has paid a container shipping rate, covering the movement from his establishment to that of the consignee, the rate does not change whether or not we strip the container at our facility.

Our responsibility is to pick up the cargo at the port in the container and deliver the cargo to the consignee. Once we have picked the container up from the pier, and signed a container interchange agreement with the steamship line, the cargo in the container and the container itself are totally within our responsibility and control.

At the time we pick up the container at the pier, we enter into a bill of lading contract with the consignor, through his agent, wherein we agree to deliver the cargo according to the terms of the agreement and be responsible for shortages and damages while in our possession. A copy of a typical straight bill of lading agreement which makes us responsible for the movement while the cargo is in our possession is attached as Appendix E.

If the I.L.A. rules on containers were enforced and we were prohibited from stripping any containers at our facility, it would have an adverse impact on our business in the following ways. Certain container loads are stripped because their cargo is going to an out-of-state destination where we must haul other general cargo. By combining the containerized freight and the other non-containerized freight into our own road equipment which has approximately 400 to 700 additional cubic feet of capacity over a 40-foot container, we can deliver it in one trip. If we could not combine such loads, many would become cost prohibitive. Also, if we have to haul a container to a particular location where we believe it would be difficult to secure a return shipment, we either have to haul a container back empty or let it remain unused until a return freight load could be secured. Thus, we would lose money by paying excessive per diem container charges. By hauling that cargo from our terminal in our own equipment our equipment can be taken thereafter anywhere in our system for efficient use. Load capacity and cost factors dictate when we will strip containers at our facility. When we strip cargo from containers, we

handle it in the same manner at our dock as we do other kinds of cargo.

Some containers we do not strip, for these reasons, because they are loaded with specially packed cargo or especially valuable cargo which prudence dictates we do not physically handle despite the other economic considerations.

If we were not permitted to freely strip containers when we felt it was in our best interest, this would cost us revenue and customers. However, other containers which we could ordinarily strip we would simply haul unstripped to the consignee. Where this happened, neither we nor the I.L.A. would strip the container.

Further, I saith not.

/s/ Robert W. McCleskey
ROBERT W. MCCLESKEY

AFFIDAVIT

COMMONWEALTH OF VIRGINIA

CITY OF CHESAPEAKE

I, Allie S. McNeil, after first being duly cautioned and sworn state the following of my own personal knowledge and belief.

I am Vice President of D. D. Jones Transfer and Warehouse Company, Inc. ("Company" or "D. D. Jones"). I have been employed in this capacity for approximately twelve years. In my capacity as Vice President I negotiate all sales contracts and participate in the overall management of the Company. I previously served as Sales Manager. I have been employed by the Company for approximately twenty-five years.

D. D. Jones was formed in 1928. The Company is engaged in the business of local drayage and general warehousing of freight. The Company has operating authority in the commercial zones of Norfolk, Chesapeake, and Portsmouth, Virginia. It also has operating authority in Virginia, North Carolina and South Carolina for the carriage of household items. D. D. Jones also operates the ramp for the piggyback operations of Norfolk and Western Railroad at its Atlantic Avenue, Chesapeake, Virginia yard and of Seaboard Coast Line Railroad at its South Street, Portsmouth, Virginia yard, and the piggyback services offered by the railroad provides for movement on railroad flat cars of intermodal containers or motor carrier trailers.

D. D. Jones' current facilities consist of approximately one million total square feet of distribution warehouse facilities at four separate locations. The facility at 1920 Campostella Road, Chesapeake, Virginia has about 210,000 square feet, the facility at 1960 Diamond Hill Road, Chesapeake, Virginia, approximately 266,000 square feet, the facility at 2626 Indian River Road,

Chesapeake, Virginia, approximately 335,000 square feet and the facility at 630-22nd Street, Chesapeake, Virginia, approximately 200,000 square feet. These facilities are pictured in the photographs attached hereto as Exhibits A-D.

As these photos indicate, each facility consists of a large building with many covered loading docks. Ceiling heights are twenty-five feet or more. The inside of the warehouse consists of a large storage area with markings on the floor designating various cargo storage areas. The warehouses utilize a "trigger system." A one-eighth inch cut is made in the floor of the warehouse to provide a "track" passing various storage stations. A wire is inserted in this track to which a power unit is attached. The power unit can be operated by remote control to move cargo to the designated stations in the storage area. Photos of the warehouse and the tugger system are attached as Exhibit E. In addition to the tugger system, the Company uses blades, roll and squeeze clamp fork lifts, conveyors, pallets and pallet racks to store and distribute customers' cargo. The conveyors and tugger system are coordinated to ensure swift location and discharge of stored merchandise.

The Company employs a total of one hundred ninety-four hourly non-clerical employees to run its operations. These employees drive, load, and unload truck trailers and containers, segregate and label cargo, palletize and stack cargo and other warehouse functions. Although they were previously represented by Teamsters Local 822, the union was decertified in 1977. The Company has never differentiated between drivers on the basis of "over-the-road" or "city." Any driver could transport any load.

Although the amount of cargo handled at our facilities has vastly increased, our basic warehouse services have remained the same. As did the Company after 1965, prior to the advent of the modern (8′ X 8′ X 20′ X 40′) container in 1965, D. D. Jones offered intrastate long

haul, local cartage and warehousing services to its customers. The warehousing service we offer has never and could not be offered by the pier terminal operators or sea carriers. Cargo brought to our warehouse is broken down beyond crates or cases of cargo to individual pieces of merchandise. We have broken down crates of shoes, sweat suits and various items of clothing and have packed, wrapped and delivered individual items. Such cargo is kept in our facility anywhere from one day to one year before being released according to our customers' instructions. It is not subject to the higher incidence of pilferage and damage which historically has characterized pier storage. The cargo may be quickly retrieved and loaded onto trucks without the delays attendant to on-pier pickup and deliveries.

Prior to containerization the procedure for handling import freight was as follows. The Company would generally be notified by its customer, the shipper or consignee, that cargo would be coming to the port in the near future. The Company ordinarily would receive in advance of the cargo a "packing list" indicating the cargo to be picked up. An example of such a list is attached as Exhibit F. Upon arrival of the cargo the shipper or its agent, a broker or freight forwarder, would forward to the Company a delivery order and/or a bill of lading, attached as Exhibits G and H, respectively. The bill of lading is the Company's contract of carriage with its customer. Its execution is required by the I.C.C. The delivery order merely directs the steamship company performing the ocean carriage to release the cargo to D. D. Jones.

On receiving notice of the cargo's arrival, a Company dispatcher would direct a driver to pick up the cargo. D. D. Jones stations some of its drivers at the pier for this purpose. The dispatcher might also contact a driver by two-way radio. The driver would report to the guardshack at the terminal gate to obtain a pass before entering the terminal.

Once inside the terminal the driver would report to the terminal's delivery clerk. The driver would present the bill of lading and/or the delivery order covering the cargo, and the clerk would prepare a delivery receipt. A delivery receipt is attached as Exhibit I. The clerk would direct the driver to the location of the cargo in the terminal. The cargo might be located in an open area on the pier or in a covered storage area.

After finding the cargo, the driver would contact a "checker" who would direct ILA laborers to load the truck trailer. The driver would oversee this loading to ensure that the load was balanced so as to meet highway weight requirements.

After the truck was loaded the driver would sign the delivery receipt evidencing receipt of the cargo indicated on that document. The driver would then proceed to a D. D. Jones warehouse. At the warehouse, D. D. Jones would prepare a freight bill. An example of a freight bill is attached as Exhibit J. This bill would be forwarded to the customer.

Depending on the type of service selected by the customer, D. D. Jones would handle the cargo in various ways. If the load did not fill a conventional trailer and was to be delivered immediately to a non-local consignee, it would be consolidated with cargo destined to the same area as the consignee and delivered. Similarly, if the goods of multiple consignees located in different non-local geographical areas were picked up at the pier, this cargo would be unloaded at the terminal and reconsolidated into trucks with cargo destined for the same geographic area. Local deliveries were usually made without rehandling of the cargo at the D. D. Jones warehouses. Cargo to be warehoused would also be unloaded from the truck. The cargo would be stored and segregated, labeled, palletized and placed in a designated storage area. As indicated, for certain customers, D. D. Jones would break open some crates of cargo for subsequent delivery of individual pieces of merchandise.

D. D. Jones also handled export cargo prior to use of the modern container. Export cargo would either be picked up by D. D. Jones at the shipper's facility, delivered to D. D. Jones in one shipment for carriage to the pier, or delivered to D. D. Jones in several small lots for storage and later consolidation into a shipment under one bill of lading. The process of taking export cargo to the pier was the reverse of that followed by the trucker picking up import cargo. If D. D. Jones picked up the export cargo at the shipper's place of business, the bill of lading would be made out at that time. The freight bill would generally be made at D. D. Jones' facility prior to delivery of the cargo to the pier. The checker at the pier would sign the bill as an acknowledgment of the delivery of the cargo.

Modern containers began appearing in the port of Norfolk around 1965. Initially they were hauled on regular, non specialized ships and barges. Smaller containers, called conex boxes, had for many years been handled in Virginia. These containers were treated as single pieces of cargo. D. D. Jones would simply haul them to its facility on a flatbed truck or van. It would there strip the box of its cargo and perform whatever service on the cargo its customer had selected.

Containerization did not change the nature of the services offered by D. D. Jones. A pamphlet attached as Exhibit K indicates the services offered by the Company after containerization. Because forty-foot containers hold approximately twenty percent less cargo than modern forty-five foot high cube truck trailers, containers destined to non-local consignees were handled the same as similar sized break bulk shipments. Containers to be delivered to non-local consignees would be unloaded and the cargo consolidated into D. D. Jones' trailers with other consignees' cargo destined to the same geographic area. Local deliveries could be made without stripping for economic reasons. Thus, after D. D. Jones phased out its long haul service in 1970, such transfers of cargo from

container to truck were not made for delivery within the local area.

Nor did the container materially affect the physical operation of our export consolidation or import deconsolidation service. Our warehouse employees loaded and unloaded cargo from and to the container in the same manner as they had handled break bulk cargo hauled in a truck trailer. We used the same equipment, such as various types of fork lifts, a conveyor system, pallets, etc.

Containerization did change the volume of work we handled. Containerization increased the speed with which import cargo could be retrieved from the pier. Instead of remaining on the pier three to five days like break bulk cargo, containerized cargo could be moved on and off the pier in one day. Because the cargo was not exposed at the pier, less damage and pilferage was possible. Containerization made it feasible to ship types of commodities through the Hampton Roads port which were never shipped through here in break bulk days. The container transportation system has resulted in a new mix of commodities being handled on the pier.

One new service which D. D. Jones began performing around the same time as modern containers appeared in the port was the operation of the ramps for the piggyback operations of the Norfolk and Western and the Seaboard Coast Line Railroads. Truck trailers loaded with cargo and stacked "piggyback" would be transported by railroad car to the yards in Norfolk. D. D. Jones would remove these trailers from the railroad cars. Some of these trailers would be transported to D. D. Jones' warehouse or to the consignee by D. D. Jones' drivers. The Company also consolidated various shipments of cargo in its warehouses and packs this cargo into trailers to be carried on the piggyback operation. Its operations are the same as with break bulk and containerized cargo.

One of our warehouses is a bonded U.S. Customs Department Warehouse. Containers may remain sealed and pass through the port without Customs inspection directly

to our bonded warehouse. The container remains sealed until a Customs inspector arrives to break the seal and inspect the contents of the container. Prior to containerization, break bulk cargo moving on an "in-transit manifest" could be inspected at our warehouse.

The process for handling import and export cargo at the pier is very similar to what happens with break bulk cargo. Because a container is removed from the pier, however, D. D. Jones' drivers must haul the containers through a maintenance and repair line and an interchange station line. At both of these locations the container is inspected for any damage. At the interchange station a Trailer Interchange Receipt and Inspection Report is completed. An example of this report is attached as Exhibit L. It takes the driver from one to three hours to pass through these two lines. Since I.L.A. labor has historically loaded break bulk cargo in our trucks with only supervision by our employees, containerization saved D. D. Jones no additional loading and unloading costs. For movement of cargo from the seaport terminal into our warehouse, both before and after containerization, our driver simply pulled a loaded trailer from the terminal to our warehouse, where our employees unloaded the cargo. The amount of containerized cargo hauled, as well as the number of containers stripped and stuffed, is indicated in the chart attached as Exhibit M.

Enforcement of the Rules in the early 1970's adversely affected our operation. Because the I.L.A. felt that the stripping and stuffing of containers at our facilities violated the Rules, it instructed the steamship lines not to release containers which we had been ordered by our customers to pick up. I.L.A. labor would strip the containers at the pier, and the terminal operators would charge our customers for this unwanted handling. The extra fee was not part of our customer's agreement with the sea carrier to transport the cargo. D. D. Jones picked up the formerly containerized cargo in break bulk form and

brought it to its warehouse where it was treated in our normal fashion.

The I.L.A.'s action caused many of our customers to cease using us as their port area agent and distribution center. Our customers simply had other trucking companies haul the containers to other facilities beyond the fifty-mile limit. Enforcement of the Rules on Containers did not provide additional stripping and stuffing work to the I.L.A. It simply forced business out of the Hampton Roads port or at least beyond the fifty-mile limit.

The service performed by D. D. Jones is directed by its customer. D. D. Jones is told what cargo to pick up or deliver, what containers to strip and what cargo to store. D. D. Jones cannot impose on its customer charges for unrequested services. Thus prior to 1970 when D. D. Jones chose for convenience to strip a container designated to a non-local consignee, its customer was not charged for this service. D. D. Jones' contract with its customer consists of the bill of lading. This contract provides:

> No carrier is bound to transport said property by any particular schedule, train, vehicle or vessel, or in any particular market or otherwise than with reasonable dispatch. (Exhibit G).

Execution of a bill of lading is required by the I.C.C. It gives D. D. Jones complete control over the cargo in its possession. Likewise, the Trailer Interchange Receipt and Safety Inspection Report provides that the carrier:

> shall have complete control and supervision of such trailer, and such trailer shall be operated under its common carrier responsibility to the public and to public authority while in its possession: and [Neptune Orient Lines] shall have no right to control the detail of the work of any employee or agent operating or using said trailer during such time. (Exhibit L).

Under this agreement with the sea carriers, D. D. Jones retains complete control over the containers.

In addition to the Trailer Interchange Receipt and Inspection Report, D. D. Jones is a signatory to the Uniform Intermodal Interchange Agreement. Section 4.1(a) of this Agreement states:

> User shall have the right of complete control and supervision of equipment while in its possession and shall be responsible for returning the equipment in the same condition as received, ordinary wear and tear excepted.

Thus by the terms of these contracts, D. D. Jones retains complete control of the cargo and the container. Sea carriers have no right to control what D. D. Jones does with the containers at its warehouses. Its actions are controlled by its customers' instructions.

Further I sayeth not.

/s/ Allie S. McNeil
ALLIE S. MCNEIL

AFFIDAVIT

STATE OF NEW JERSEY)
) SS:
COUNTY OF ESSEX)

I, Allis S. McNeil, after first having been sworn, state to my own personal knowledge and behalf the following.

1. I am Vice President of D. D. Jones Transfer and Warehouse Company, Inc., 630 Twenty-Second Street, Chesapeake, Virginia 23324, (804) 545-7374, a position I have held for fifteen years. I am also President of Tidewater Motor Truck Association, an association of motor common carriers operating in the Hampton Roads, Virginia port area. All of the motor carriers which are members of this association are, like D. D. Jones, involved in stuffing and stripping containers at their off-pier facilities in Hampton Roads port area, and hauling containers either locally or long-haul inland. Some of these motor carriers, like D. D. Jones, are also involved in warehousing cargo for their customers at their off-pier facilities, and in providing distribution services for import cargo. D. D. Jones has traditionally consolidated and deconsolidated both full shipper's load (FSL) and less-than-containerload (LCL) containerized cargo at its four Chesapeake, Virginia warehouse locations and hauled containers between its six warehouses and the various seaport terminals in the Port of Hampton Roads, in addition to performing other cargo handling and warehouse services for its customers, including hand sorting, individual packaging, and inventory control. D. D. Jones has provided these warehouse services continuously since 1928, and has provided container consolidation and deconsolidation services continuously since 1965, prior to the implementation of the ILA's Rules On Containers.

2. Effective January 2, 1981, all vessel operating common carriers (VOCCs) began enforcing the Rules On Containers in the Port of Hampton Roads pursuant to an

agreement concluded between the ILA and the Hampton Roads Shipping Association, among other parties, on or about December 6, 1980 in Miami Beach, Florida. Pursuant to this Miami Beach Agreement, all of the VOCCs in the Port of Hampton Roads with which D. D. Jones deals have refused to release import containers to us, unless D. D. Jones will agree to warehouse all containerized import cargo for a minimum of thirty days before releasing it to its consignees and agree to indemnify the VOCCs for any fines levied against them by the ILA under the Rules On Containers. D. D. Jones has refused to agree to warehouse all import cargo for a minimum of thirty days, since this would violate its customers' delivery instructions in most cases and would deprive D. D. Jones' customers of the right to obtain their import cargo at the time of their choosing. D. D. Jones has also refused to agree to indemnify VOCCs for fines levied under the Rules On Containers. As a result, the only import containers which have been released to D. D. Jones by VOCCs since January 2, 1981 are those for which the shipper or his agent has agreed to warehouse the cargo for at least thirty days after the container is stripped.

3. Since January 2, 1981, the VOCCs have not released empty containers to D. D. Jones at the pier for stuffing at D. D. Jones' warehouses. The VOCCs have told some motor carriers and warehousemen in the Hampton Roads Port area not to stuff containers which were released to them prior to January 2, 1981, and to return these export containers to the seaport terminals empty. All export cargo containterized or scheduled to be containerized by non-ILA labor at off-pier facilities within fifty miles of the piers in the Port of Hampton Roads has been brought to a standstill, since the VOCCs will not release any containers for stuffing off-pier within fifty miles of the pier by non-ILA labor and have refused to accept for shipment many containers which were stuffed by non-ILA labor at off-pier facilities within fifty miles of the pier, even though the VOCCs released those containers to

motor carriers, consolidators, and NVOCCs for that purpose prior to January 2, 1981.

4. Prior to January 1, 1981, one of D. D. Jones' customers booked space for an entire shipment of forty-two 40 foot export containers aboard a United Arab Lines vessel scheduled to leave the Port Of Hampton Roads for the Middle East in January, 1981. D. D. Jones picked up twelve of these forty-two containers at the seaport terminal and hauled them to one of our warehouses to load appliances for shipment to the Middle East. These applicances must be containerized at our warehouse, and cannot be containerized on the pier, in order to fully utilize the capacity of a container; to assure proper loading by our specially trained employees; and because air bags and special crates which we construct are required for proper loading of these appliances to prevent them from shifting in the container during shipment and being damaged as a result. Because these twelve containers had been released to us prior to January 2, 1981, when the VOCCs and the ILA began enforcing the Rules On Containers, United Arab Lines' agent, Kerr Steamship Agency, accepted these containers from us for shipment aboard, United Arab Lines' vessel. However, on or about January 5, 1981, Kerr Steamship Agency told us that United Arab Lines would not release to us the thirty additional containers which had also been booked prior to January 1, 1981 for this forty-two container shipment. As a result, our customer's shipment was split and he has been unable to honor his delivery commitments to his consignees in the Middle East. Our customer has also requested us to load an additional fifty-two containers with his appliances for export, but the VOCCs have refused to release these containers to us as well. As a result, D. D. Jones has been unable to export eighty-two container loads for this single customer since January 2, 1981. On January 9, 1981, this customer contacted us and demanded that we find a way to export his appliances as soon as possible. His representative told us that

"we won't work with people in the future who won't work with us now." The enforcement of the Rules On Containers to deny us access to any export containers into which to load our customer's appliances at our off-pier facilities where these appliances are warehoused could result in our loss of his business entirely. Since this customer is D. D. Jones' single largest export client, the interruption in our service caused by enforcement of the Rules On Containers and the risk that we may lose this account if we are unable to obtain containers immediately will cause substantial and irreparable injury to our business, including our income and our business reputation.

5. The enforcement of the ILA's Rules On Containers has also created an impossible cargo handling situation at the seaport terminals in the Port Of Hampton Roads. For example, Dart Orient Services, Inc., a VOCC, refused on January 7, 1981 to accept for shipment aboard one of its vessels, S/S Dart Europe, a container obtained from Dart by D. D. Jones at Norfolk International Terminal, stuffed by D. D. Jones with its customer's perishable chemical products, and returned by D. D. Jones to Norfolk International Terminal for shipment by Dart. When Dart refused to accept this stuffed container at the seaport terminal, our customer's freight forwarder, Norton & Ellis, arranged for another VOCC, United States Lines, to accept the container at Norfolk International Terminal on January 8, 1981 and ship it aboard one of its vessels after the container had been stripped and restuffed by ILA labor on the pier. However, this chemical product is unstable at low temperatures and must be protected from freezing at thirty-two degrees Fahrenheit. On January 9, 1981, I contacted United States Lines by telephone to determine whether this VOCC had facilities available at Norfolk Industrial Terminal to store this container, strip it, and restuff it without exposing its contents to freezing temperatures, and whether the temperature of this cargo had been protected by the VOCC at the seaport terminal since United States Lines ac-

cepted the container on January 8, 1981. I learned from an agent of United States Lines that no facilities were available to protect this cargo from freezing while the container sat on the pier, or during stripping and restuffing by ILA labor, and that no precautions had been taken to protect the temperature of the cargo. Since this container was delivered to the seaport terminal, outdoor temperatures have been constantly below thirty-two degress Fahenheit in the Hampton Roads port area, and it is probable that our customer's chemicals have already been ruined because of the VOCC's inability to handle them and store them properly on the pier. Copies of delivery orders identifying this transaction and noting the perishable nature of our customer's chemical products are attached hereto collectively as Exhibit "A".

6. Our Company cannot continue to do business without containers being supplied by the VOCCs who sublease containers for cargo transport in the Port of Hampton Roads. We cannot service our shipping customers without using these containers, and any interruption of our service by the VOCCs will lead to the irrevocable loss of business for us which we cannot recover from our customers or by money damages, in addition to the loss of cargo as the result of improper handling and storage on the pier. In consequence, our business will suffer an irrevocable loss.

7. Further I sayeth not.

/s/ Allie S. McNeil
ALLIE S. MCNEIL

Transfer and Warehouse Company, Inc.
Chesapeake Virginia 23324 phone 804 545-7374

S 39842

DATE 1/07/81 ccs

ORDER ON WAREHOUSE

NORTON & ELLIS & DART LINES
NORFOLK, VIRGINIA
EASTMAN CHEMICAL INTERNATIONAL A.G.
C-O NMT INDUSTRIAL STORAGE
CORONATION ROAD, BRITTANIA WAY
LONDON, NW10, ENGLAND
S/S DART EUROPE 1/11/81
BOOKING #FENFS076

A/C OF TENNESSEE EASTMAN & DD JONES WHSE. #2
BROKER NORTON & ELLIS
EXPORT ORDER NO D38040
REF. # OR SHIPPER'S W56-8004
REP. REF. NO TWX 25 1-5
CUSTOMER'S ORDER NO: AC REQ 1-5

~~A 657~~

ROUTE DD JONES — PREPAID X

DESCRIPTION OF MATERIALS — WEIGHT

DRUMS EASTMAN WD WATER DISPERSIBLE POLYESTER (WD 3652 SIZE) 276# EACH — 30,360#
PROTECT FROM FREEZING
PRODUCT FREEZES AT 32°F.

VESSEL: S/S DART EUROPE 1/11/81
BOOKING #FENFS076
PORT OF DISCHARGE: SOUTHAMPTON
DELIVER TO NIT BY 1/09/81.

CONTAINER# __________

SEAL# __________

MARKINGS:
D-38040
UK PORT
NOS. 1/
MADE IN UNITED STATES OF AMERICA
USE NO HOOKS

NOTIFY:
LEWIS HAWKINS & CO., LTD.
FOCAL HOUSE
12-18 STATION PARADE
BARKING, ESSEX, 1G11 8DJ
ENGLAND

BILL CHARGES TO:
EASTMAN CHEMICAL PRODUCTS, PO BOX 431, KINGSPORT, TENNESSEE 37662

CARRIED FOR — P.M. DATE
DELIVERY:
STARTED UNLOADING — A.M. P.M. DATE
OR DROPPED
COMPLETED UNLOADING — A.M. P.M. DATE
RELEASED — Received In Good Order Except As Noted:
CUSTOMER'S SIGNATURE
DRIVER — DATE

CONTROL COPY

NORTON & ELLIS & DART LINES
NORFOLK, VIRGINIA
EASTMAN CHEMICAL INTERNATIONAL A.G.
C NMT INDUSTRIAL STORAGE
CORONATION ROAD, BRITTANIA WAY
LONDON, NW10, ENGLAND

SHIPPER – ORIGIN
EASTMAN CHEMICAL PRODUCTS, INC.
& DD JONES WHSE. #3
CHESAPEAKE, VIRGINIA

EXPORT ORDER NO: D38040
REP. REF. NO: TWX 25 1-5

CUSTOMER ORDER NO.: AC REQ 1-5
WAREHOUSE RELEASE NO.: W56-8004

B/L NO.: E- 58822
B/L DATE: 1/07/81 ccs

FREIGHT CHARGES:
FREIGHT PREPAID: except when box at right is checked — Check box if charges are to be collect

SUBMIT BILL FOR FREIGHT CHARGES TO:
EASTMAN CHEMICAL PRODUCTS, INC.
P. O. BOX 431
KINGSPORT, TN 37662

ORIGIN CARRIER & ROUTING: DD JONES
CONTAINER#
SEAL#

ATTENTION – FIELD TRAFFIC

NUMBER PIECES	TYPE PACKAGE	HM	DESCRIPTION OF ARTICLES, SPECIAL MARKS, EXCEPTIONS	WEIGHT	CLASS OR RATE	FREIGHT CHARGES
110	DRUMS		EASTMAN WD WATER DISPERSIBLE POLYESTER WD SIZE 3652 (276# EACH)	30,360#		
			PROTECT FROM FREEZING PRODUCT FREEZES AT 32°F.			
			MARKINGS: D-38040 UK PORT NOS. 1/ MADE IN UNITED STATES OF AMERICA USE NO HOOKS			
			VESSEL: S/S DART EUROPE 1/11/81 BOOKING #FENFS076 PORT OF DISCHARGE: SOUTHAMPTON DELIVER TO NIT BY 1/09/81.			
			NOTIFY: LEWIS HAWKINS & CO., LTD. FOCAL HOUSE 12-18 STATION PARADE BARKING, ESSEX 1G11 8DJ ENGLAND			
			C.O.D. AMOUNT →			

FOR HELP IN CHEMICAL EMERGENCIES INVOLVING SPILL, LEAK, FIRE OR EXPOSURE, CALL TOLL-FREE 800-424-9300 DAY OR NIGHT.

SHIPPER: EASTMAN CHEMICAL PRODUCTS, INC.
CARRIER
PER — PER

BEST AVAILABLE COPY

AFFIDAVIT

COMMONWEALTH OF VIRGINIA

CITY OF CHESAPEAKE

I, Donald D. Moore, 2704 Horseshoe Drive, Chesapeake, Virginia 23322, after first having been duly sworn, state of my own personal knowledge and belief the following.

I have been Terminal Manager of the Overnite Transportation Company facility located at 2053 S. Military Highway, Chesapeake, Virginia 23320, for about one year. I have been employed by Overnite for about fifteen years. Prior to my present job, I was Terminal Manager at Bluefield, West Virginia for about two years and Assistant Terminal Manager in Cincinnati, Ohio for two years.

Overnite is a nonunion company. Overnite is a long haul, general cargo commerce carrier operating under the authority of the Interstate Commerce Act. Generally, we operate betwen cities in interstate commerce. In Virginia, Overnite performs no intrastate carriage from Norfolk to other points within the State, with the exception of import and export cargo. We pick up cargo at the establishment of manufacturers and other shippers within the Norfolk and surrounding area for interstate shipment. We also deliver cargo to similar local establishments originating out of the State of Virginia. We perform no local cartage service, which requires picking a cargo up from one business establishment and delivering it to another business establishment within the area. However, we pick up cargo in containers and noncontainerized break-bulk cargo from seaport terminals in the Hampton Road area; and we deliver such cargo to inland areas outside the 50 mile radius.

Our freight terminal has been in active operation at this address since 1957. We began operating in the Norfolk area in 1955. Our present freight terminal consists of a two-story office building which houses clerical workers, dispatchers, and management. Our freight dock is attached to the back of the building. The dock floor is elevated from the parking lot to the height of a tractor trailer truck bed. The dock has a roof on it. It is approximately forty feet wide by 260 feet long. It has twenty-four, ten foot wide doors along each side. Trailer trucks and containers are backed up to these doors for loading and unloading.

Attached as Appendix A is a photograph taken this date from the middle of the freight dock looking away from the office building. Boxes of cargo are shown sitting on a wooden pallet on the bottom right hand of the picture. Other boxes of cargo are sitting on a wheeled, hand propelled dolly in the left hand side in the sunlight. Atached as Appendix B is a photograph taken from one of the freight dock doors looking away from the dock. To the right a motor tractor is hooked to a cargo container resting on its chassis. The trailer to the left of the picture is a road trailer. Both the container and trailer are forty feet long.

We haul power driven lift trucks and wheeled dollys to help move cargo at the terminals. Approximately 75% of the general cargo we handle must be handled by hand during some phase of the loading and unloading at our terminal. This method of cargo handling has been used at our terminal for many years, since at least World War II. We warehouse no cargo at our terminal. Of the cargo coming to our terminal, 98% is shipped out within twenty-four hours. The balance remains at our terminal until it is convenient or economical to deliver.

The advent of containerization in this area in about 1967 did not cause any basic changes in the methods we use to handle freight at our terminal, in the freight handling equipment at the terminal, or in the physical construction of the dock.

Our method of doing business with customers and the general public has remained basically unchanged since we began business. We contract to haul freight with any

type of business or person who wants our services, including; manufacturers, freight forwarders, brokers, consolidators and steamship companies, and the general public.

All domestic freight originating in the United States for delivery outside the State of Virginia is ordered picked up by our customer through his call to our dispatchers' office. If he wishes to ship part of a load of cargo to an out-of-state location, we will pick it up at his establishment, bring it to our terminal, consolidate other freight with it in order to fill up the trailer, and haul it out of state. The reverse process is followed for freight hauled into the area. If a customer wants to ship a full trailer load of freight, it will likewise be picked up and brought to our terminal before delivery in the area.

All cargo hauled by Overnite must come to the terminal because local pick up and deliveries are made by a group of local drivers, and the over-the-road hauling is performed by long haul drivers.

Our delivery services are charged at rates incorporated into tariffs submitted for approval and approved by the Interstate Commerce Commission. We have different tariffs for different types of services.

Each piece of cargo we carry must be covered by a bill of lading. Bills of lading are required by the Interstate Commerce Act. A typical bill of lading is attached hereto as Appendix C. We are required to fill out the bill of lading, although frequently the shipper has already made out our bill of lading by the time we pick up the cargo. If there is no bill of lading made up by the shipper, the driver must make out a bill of lading before he leaves the shipper's premises.

The bill of lading constitutes a non-negotiable agreement between the shipper and our company for the services required. All the terms of the agreement are stated on the bill of lading. A copy of the completed agreement is left with the shipper, and a copy is returned to our office. The bill of lading is signed by our driver on behalf of Overnite and by the shipper or his agent.

When the outbound cargo reaches our terminal, we transfer the information from the bill of lading agreement to a waybill. Appendix D. By law, this waybill is required to accompany the freight to its destination. The designated receiver of the freight is required to check it against the amount shown on the waybill and check for damage. He must sign the waybill acknowledging delivery or damage or shortage.

While in our possession, the cargo is our responsibility, totally. Unless otherwise specified in the bill of lading, there is no contractual limitation on our right to use whatever equipment or transportation process we desire to use to deliver the cargo. However, it might be specified, for example, that we use a refrigerated trailer.

The way we handle imported containers is as follows. Generally, a customs house broker would send to us, usually by messenger, a bill of lading he has made out covering the ground transportation of a container held at a seaport terminal. Appendix E. We would send a truck to the pier with a container delivery order form prepared by the customs house broker. Appendix F. The order form would be given to someone in charge of dispatching the containers at the port terminal, who would then release the container to our driver. A cargo release form would be issued to our driver. Appendix F. He would haul the container back to our terminal pursuant to the authority of the bill of lading agreement. This same bill of lading would also cover the movement of the cargo from our terminal to the point of ultimate destination. A copy of the customs house bill of lading is attached as Appendix G.

When we pick up a container, it is covered by an interchange agreement our company has negotiated with the steamship company. A typical agreement is attached as Appendix H.

When we deliver a container to the port terminal company, it is covered by the bill of lading issued by the original shipper. Whoever receives the container signs off on

the manifest. At that time, our responsibility for the container and its contents ends.

Generally, freight forwarders and custom house brokers make the decision to select us to haul containers or noncontainerized freight to the consignee or other receiver. In any case, the steamship line companies never specify who will haul cargo, containerized or otherwise, to or from the piers. They are not responsible for and are not in the business of arranging for land movement of cargo.

We do not have records prior to 1979 from which to calculate the amount and classes of cargo we handled to and from the seaport terminals. However, in 1979, we hauled from all Hampton Roads Ports 789,370 metric tons (2,204 lbs. per metric ton) of general cargo. We hauled 1,031 containers from the port, including 20′ and 40′ containers. We believe these containers carried an average of 38,000 lbs. per container, for a total estimated amount in containers of 17,771 metric tons. Of these containers 320 were stripped at Norfolk terminal and the cargo was reloaded into Overnite equipment for transportation beyond Virginia. None of this cargo was delivered to any location within 50 miles of the port. Almost all of the containers stripped were 20′ containers. We stripped about 31% of all the containers we hauled from the piers in 1979.

In 1979, 1647 containers of cargo were hauled by us from beyond 50 miles of the port to various sea terminals. These containers were filled in the agrigate with an estimated 28,389 metric tons of cargo. None of these containers were of the 20′ variety. Overnite did not stuff these containers with any cargo, to my knowledge.

Also, in 1979, we hauled 616 containers, all 40 footers to the piers, which were in essience empty containers we were returning to the port. These were containers which we had hauled to our terminal from out of state containing freight Overnite had stuffed in them for shipment to our Norfolk terminal. There it was deconsolidated and distributed to consignees in the area. We then filled the

containers with general break-bulk cargo at our Norfolk terminal, so as to use the container and not have to haul it empty back to the piers. This break-bulk cargo was delivered to various places at the seaport terminal, as all other break-bulk cargo was delivered with over-the-road truck equipment. When it was empty, the container was turned in for reuse at the pier. None of these containers were shipped with the cargo we stuffed in them at our terminal by steamship lines. These 616 containers carried an estimated 10,618 metric tons of cargo to the piers, which, but for returning these empty containers, would have been carried as break-bulk cargo by over-the-road equipment. The total percentage of cargo we hauled in 1979 in containers is estimated to be around 6% of our total cargo hauled.

The I.L.A. Rules on Containers would have no effect on our operations regarding container cargo to the piers, because we stuff no cargo into containers within 50 miles, except break-bulk cargo hauled in the empty containers back to the piers which is stripped at the piers and thereafter handled by I.L.A. labor.

However, the Rules on Containers, if applied to import containers we strip at our terminal would prevent us from handling any 20′ containers. This would probably cost us the ability to handle the many 40′ containers covered by the same bills of lading, because the agents would not want to split the order up between various companies.

Import containers filled with cargo assigned to one consignee beyond the 50 mile limit would under no circumstances, I can imagine, be stripped at the pier and hauled by Overnite or any other carrier from the pier in break-bulk form to the consignee, if the Rules on Containers required such pier side stripping. The reason for this is that the shipper ships the container under a full container load tariff rate, which does not contemplate the additional charges it would cost to strip the container at the pier and forward it on in break-bulk form in road

(6)

No. 84-861

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
AFL-CIO, *et al.,*
Respondents.

MOTION OF DELTA STEAMSHIP LINES, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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**Counsel of Record*

March 1, 1985

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

20pp

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v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
AFL-CIO, *et al.,*
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Delta Steamship Lines, Inc. ("Delta") respectfully moves for leave to file the attached brief as *amicus curiae* in this case. Petitioner and all respondents supporting petitioner have consented to the filing of the attached brief; the remaining respondents oppose the filing.

Delta is currently involved in litigation against the International Longshoremen's Association, AFL-CIO ("ILA") in proceedings pending before the United States District Court for the Southern District of New York. Unlike the present proceedings, which address the operation of the Rules on Containers vis-a-vis off-pier concerns such as truckers and warehousemen, Delta's case examines the Rules as they

operate to restrict carriers who do not themselves employ longshoremen from utilizing non-ILA stevedoring facilities from Maine to Texas.

No definition of traditional longshore work—the definition of which is the sole issue before the Court—can render lawful ILA attempts to contract with non-employers to boycott non-ILA stevedoring companies at all ports on the East and Gulf coasts. Yet the Fourth Circuit's sweeping assertion that the Rules on Containers are "valid in all respects" could introduce ambiguity about the effect of that false conclusion on Delta's case. Only this court can erase the doubt by recognizing the limits of the issue before it. Without such recognition, this Court might, like the Fourth Circuit, prejudice ongoing challenges to the Rules that the Court has not had the opportunity to consider.

For these reasons, Delta requests leave to file its attached brief as *amicus curiae* in support of petitioner.

Respectfully submitted,

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March 1, 1985

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-861

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *et al.*,
Respondents.

BRIEF OF DELTA STEAMSHIP LINES, INC. AS *AMICUS CURIAE*

INTRODUCTION AND STATEMENT OF INTEREST

The Fourth Circuit's decision at issue held that the Rules on Containers are "valid in all respects." 734 F.2d 966, 968 (1984). Delta Steamship Lines, Inc. ("Delta") disagrees with that sweeping assertion and is currently engaged in litigation[1] against the

[1] Delta Steamship Lines, Inc. v. International Longshoremen's Ass'n, No. 84 Civ. 8104 (S.D.N.Y. Nov. 9, 1984). Delta's suit is related to consolidated cases also pending in the Southern District of New York brought by the ILA to compel Delta to arbitrate and to confirm arbitration awards already rendered, notwithstanding the fact that no contractual basis for the arbitration or resulting awards exists between the parties. *See* In the Matter of the Arbitration between International Longshoremen's Association, AFL-

International Longshoremen's Association, AFL-CIO ("ILA") over whether the Rules are, instead, invalid in respects not envisioned by the Fourth Circuit. Delta's interest is to apprise the Court of issues about the Rules on Containers which the parties have not raised and which this Court should not appear to resolve adversely to Delta's position.

The decade of litigation questioning the lawfulness of the Rules has cut an exceptionally narrow doctrinal path. Grappling with the perimeters of traditional longshore work given the shifting interface between on-pier and off-pier labor, the National Labor Relations Board ("Board") and reviewing courts have left largely unexamined critical assumptions about the operation of the Rules vis-a-vis carriers themselves. Neither the Board nor the courts, for example, have examined the assumption that the Rules apply only to carriers who employ longshoremen, despite the fact that the present carrier-ILA agreement containing the Rules provides that they apply whether the carrier "employs" *or* merely "utilizes" longshoremen "actually employed" by unaffiliated stevedoring companies.[2] Nor has anyone questioned the presumption that the Rules operate as a general rule to protect (or acquire) work only for longshoremen within a "work unit" coextensive with a particular port such as the Port of New York or Port of Baltimore. In fact, a model union-signatory clause in the Rules prohibits carriers from contracting with non-ILA stevedoring companies in thirty-six ports from Maine to Texas.[3] By speaking broadly and by failing to recognize the hypothetical backdrop against which the work-definition issue has been framed, the Fourth Circuit erroneously transformed the conclusion that the Rules may be lawful if several assumptions hold into the conclusion that the Rules "are valid in all respects."

CIO and Delta Steamship Lines, No. 84 Civ. 2493 (consolidated cases) (S.D.N.Y. April 9, 1984).

[2] The text of the carrier agreement more fully discussed below is set forth at Appendix A hereto. The distinction between carriers who "employ" longshoremen and those who merely "utilize" the services of unaffiliated stevedoring companies is found in the first "Whereas" clause of the agreement. Appendix A at 1a. The emphasis that the contract applies even though the longshoremen are "actually employed" by the stevedoring company rather than carrier signatory is found in paragraph 10 of Article II. Appendix A at 3a.

ARGUMENT

In January of 1984, the Rules on Containers were incorporated in a new collective bargaining agreement that clarified and expanded the Rules' restrictions on carrier use of non-ILA stevedoring facilities. As an outgrowth of the latest round of negotiations between the ILA and seven management associations, an agreement was reached descriptively entitled "Agreement between International Longshoremen's Association, AFL-CIO and Undersigned Steamship Carriers Subscribing to the Master Agreements and Agreements with New York Shipping As-

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[3] The Board has recognized, unlike the Fourth Circuit, that the Rules are unlawful to the extent they seek to preserve work outside a work unit defined roughly in terms of the longshoremen identified with a particular port such as the Port of New York. *See* Pet. App. at 91a, 91a n.17, 182a n. 97, 183a-186a. The Board, however, has not examined the requirement in the Rules that carriers cease doing business with non-ILA stevedoring companies from Maine to Texas.

sociation, Inc., Council of North Atlantic Shipping Associations, South Atlantic Employers Negotiating Committee, Southeast Florida Employers Association, Mobile Steamship Association, Inc., West Gulf Maritime Association, [and] New Orleans Steamship Association."[4] This new carrier-ILA agreement (herein referred to as the "January 25 Agreement") expressly requires carriers to recognize the ILA as the "exclusive Collective Bargaining Agent for all longshoremen . . . employed or utilized by such steamship carriers . . . in such 36 ports designated herein . . . ." Appendix A at 2a. The January 25 Agreement further requires carriers "to subscribe to and become parties to" each of the port or regional ILA agreements and, redundantly, specifically to the "Rules on Containers." Appendix A at 3a.[5] ILA reserves in the agreement "the right to refuse to supply labor and to picket or otherwise hinder the operation of the steamship carrier" who refuses to subscribe to the January 25 Agreement and each of its component agreements, including the Rules on Containers.

By incorporating the Rules in this new thirty-six port agreement—to which all carriers utilizing even

[4] *See* Appendix A. The well-recognized and stated purpose of this agreement was to prohibit all carriers utilizing even one ILA port on one occasion from thereafter utilizing any non-ILA stevedoring facility in thirty-six designated ports whether or not the carrier is or has ever been a member of even one of the listed management associations.

[5] Since the Rules on Containers are simply uniform terms incorporated into each of the several local collective bargaining agreements covering the particular geographic areas of defined ports, the January 25 Agreement's demand that carriers subscribe to each of these local agreements independently binds carriers to the Rules on Containers in every port.

one ILA port must subscribe—two unlawful applications of the Rules clearly emerge. The first is the application of the Rules to (and by) carriers who do not employ longshoremen represented by the ILA and who thus cannot lawfully contract with that union to cease doing business with anyone. The second arises most dramatically from the inter-port application of the Rules expressly provided for in the January 25 Agreement.

I.

The ILA Cannot Lawfully Contract With Nonemployers For Compliance With The Rules On Containers

In *National Woodwork Manufacturers Association v. NLRB,* 386 U.S. 612 (1967), the Court stated that the "touchstone" for determining the primary or secondary character of an agreement whereby an employer agrees to cease doing business with others is whether the agreement is "addressed to the labor relations of the contracting employer vis-a-vis his *own employees.*" *Id.* at 645 (emphasis added). As this test recognizes, an employment relationship between the contracting company and the employees represented by the contracting union is a *sine qua non* for a lawful agreement.

This fundamental limitation on the scope of legitimate boycott activity was reaffirmed by this Court in *Connell Construction Co.* v. *Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616 (1975). In *Connell* the Court held that a union violates Section 8(e) of the National Labor Relations Act (the "Act") if it contracts with a nonemployer to exclude nonunion contractors. The Court upheld the contention that "Congress did not intend to permit a union to

approach a 'stranger' [*i.e.,* nonemployer] contractor and obtain a binding agreement not to deal with non-union subcontractors." *Id.* at 627-28. But what Local 100 was barred from doing in *Connell* is precisely what the ILA accomplishes by incorporating the Rules on Containers in the January 25 Agreement, which expressly grants ILA the "right" to cause non-employer as well as employer carriers to subscribe to Rules that in turn forbid them from contracting the stevedoring work to companies utilizing non-ILA labor.[6]

II.

The Rules On Containers Embody A Union-Signatory Clause Expressly Prohibiting Carriers From Utilizing Any Non-ILA Facility From Maine To Texas

The Preamble to the Rules on Containers provides that signatory carriers will not "contract out" the work of loading and unloading containers from and to the ships "unless such work on such container waterfront facility [*i.e.,* any pier from Maine to Texas] is performed by employees covered by Management-ILA Agreements." This provision is a model union-signatory clause of precisely the kind repeatedly held to violate Section 8(e) of the Act. *See, e.g., Pacific Northwest Chapter of Associated Builders and Contractors, Inc.* v. *NLRB,* 654 F.2d 1301, 1307 (9th Cir. 1981) (en banc), *aff'd in part, vacated and remanded on other grounds sub nom. Woelke & Romero Framing, Inc.* v. *NLRB,* 456 U.S. 645 (1982) ("union signatory clauses . . . are secondary in objective . . . for they are intended to satisfy union objectives involving employees and employers outside of the bargaining or work unit"); *Heavy, Highway, Building and Construction Teamsters Committee,* 227 NLRB 269, 272 (1976) (union-signatory clauses "viewed as not being designed to protect . . . unit employees . . . but as directed at furthering general union objectives").

[6] As the January 25 Agreement recognizes, carriers structure their operations differently. Some hire longshoremen directly. Others, called integrated operators, hire longshoremen indirectly through affiliated stevedoring companies. Yet others choose to contract out the stevedoring work to independent, unaffiliated contractors. To hold that this last group of carriers "employ" longshoremen merely because they utilize the work force of independent contractors would, of course, go well beyond any existing definition of the employment relationship. *See* NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951).

The above-quoted union-signatory provision from the Rules fits the spirit as well as the letter of prohibitions on clauses allowing subcontracting only to employees represented by a particular union. The anti-competitive impact of prohibiting a carrier who, for example, utilizes ILA labor in the Port of New York from thereafter utilizing any non-ILA stevedoring company from Maine to Texas is obvious and severe. By locking all carriers into utilizing only ILA facilities, the union effectively ensures the death of any incipient competition from stevedoring companies whose employees choose not to be represented by the ILA. Thus this union-signatory clause—like all others—operates as intended: impermissibly to advance the union's interests rather than the interests of employees within the work unit.[7]

[7] The ILA cannot, of course, elude the union-signatory conclusion by merely arguing that the "work unit" is coterminous with

CONCLUSION

Delta's objective here is not to develop fully its pending challenges against the Rules on Containers or to interject new issues into this proceeding, but rather to provide the Court with a perspective on the Rules that the present dispute overlooks. A more complete understanding of the operation of the Rules reveals that this is ultimately not a case solely of "we" *(i.e.*, carriers, stevedores, and the ILA) against "them" *(i.e.*, truckers, warehousemen, and other off-pier concerns). It is also a case of a union's monopoly on stevedoring services acquired through years of reaching beyond the genuine employers of longshoremen—the stevedoring companies—to form unlawful relationships with the customers of those employers. In the course of answering the narrow question of how to define the traditional work of longshoremen, Delta respectfully requests that the Court not provide an unintended signal to lower courts to validate applications of the Rules in situations not addressed in these proceedings.

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the coast wide reach of the union-signatory clause, since to accept this circular defense would "permit precisely what [section 8(e)] was intended to prohibit." NLRB v. Joint Council of Teamsters No. 38, 388 F.2d 23, 28 (9th Cir. 1964); *see* Pacific Northwest Chapter v. NLRB, 654 F.2d 1301, 1308 (9th Cir. 1981) (en banc) *aff'd in part, vacated and remanded on other grounds sub nom.* Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645 (1982); NLRB v. National Maritime Union, 486 F.2d 907, 914 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974); In re Bituminous Coal Wage Agreements Litigation, 580 F. Supp. 670, 680 (W.D. Pa. 1984).

Respectfully submitted,

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Of Counsel:

Paul D. Inman
Gibson, Dunn & Crutcher

March 1, 1985

APPENDIX

APPENDIX

AGREEMENT

between

INTERNATIONAL LONGSHOREMAN'S ASSOCIATION, AFL-CIO

and

UNDERSIGNED STEAMSHIP CARRIERS SUBSCRIBING TO THE MASTER AGREEMENTS AND AGREEMENTS WITH
NEW YORK SHIPPING ASSOCIATION, INC.
COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS
SOUTH ATLANTIC EMPLOYERS NEGOTIATING COMMITTEE
SOUTHEAST FLORIDA EMPLOYERS ASSOCIATION
MOBILE STEAMSHIP ASSOCIATION, INC.
WEST GULF MARITIME ASSOCIATION
NEW ORLEANS STEAMSHIP ASSOCIATION

This Agreement made this 25th day of January, 1984 by and between the undersigned Steamship Carriers and the International Longshoremen's Association, AFL-CIO for itself and on behalf of all of its affiliated Locals in all 36 ILA ports on the North Atlantic, South Atlantic and Gulf Coasts of the United States

WITNESSETH:

WHEREAS, the Steamship Carriers and the Management Associations recognize the International Longshoremen's Association, AFL-CIO (ILA) as the exclusive Collective Bargaining Agent for all longshoremen, clerks, checkers, maintenance men and other related deep sea craft employees employed or utilized by such steamship carriers to load and unload their

steamship vessels in such of the 36 ILA ports designated herein in which such carriers load or unload their ships, and

WHEREAS, the parties hereto desire to set forth the nature and scope of the relationship between the parties on all Master Contract issues and Local Contract issues in all said ILA ports;

Now THEREFORE the parties agree as follows:

1. The ILA is recognized as the exclusive Collective Bargaining Agent and representative of all longshoremen, checkers, clerks, maintenance men and other ILA craft employees employed or utilized by such Steamship Carriers in loading and discharging of cargo on all of their ships engaged in the foreign or domestic trade of the United States to the extent and when they call at any of the 36 ILA ports designated in Appendix A.

II. Said Steamship Carriers by executing this Agreement hereby subscribe to and become parties to the following Agreements and any amendments thereto with the same force and effect as if said Steamship Carrier actually executed, signed and subscribed to said Agreements. Said Agreements are the following:

1. The Master Agreement first executed May 27, 1980 as thereafter amended on April 16, 1983 and on September 26, 1983.
2. The Management ILA Agreement dated December 6, 1980.
3. The Resolution of March 26, 1981.
4. The Tampa Agreement of May 4, 1981.

5. The Charleston Agreement of May, 1981.
6. The Work Incentive Agreement of June 19, 1981.
7. The Rules on Containers as now in effect and as may hereafter be amended in accordance with its terms.
8. The Containerization Agreement.
9. The JSP Agreement.
10. Each and every Local Agreement which may hereafter be entered into or which is presently in effect in each of said 36 ILA ports affecting the terms and conditions of employment of employees actually employed or utilized aboard the steamship vessels of said Steamship Carriers.

III. The Steamship Carriers agree to be bound by the determination of the various management and labor tribunals named in each said Master and Local Agreements.

Any determination of the tribunal named in the Master Agreement or in any of the Local Agreements shall have the effect of an arbitration determination and may be enforced by either party in any Federal District Court having jurisdiction of the parties.

IV. Nothing contained herein shall require any carrier to be liable for any contributions to any ILA fringe benefit funds not required to be paid by such carrier, if it employs a stevedore who has given sufficient surety to pay such stevedore contributions to such funds if the carrier has paid the stevedore under the stevedoring contract.

V. Should any carrier fail or refuse to sign or having signed and subscribed to this Agreement refuse to abide by any determination duly issued in accordance with this Agreement and the Agreements made a part hereof, then and in that event on 24 hours telephonic or written notice, the ILA shall have the right to refuse to supply labor and to picket or otherwise hinder the operation of the steamship carrier to the full extent permitted by applicable law.

In Witness Whereof the parties hereto have signed this Agreement by their principal officers and in the event of a signature by an Agent, such Agent shall append hereto a written authorization from the carrier authorizing the execution of this document.

Dated in the Port of Miami, and the State of Florida, on this 26th day of January 1984.

Carrier:
Sea Land Svc. Inc.
By: /s/ Louis W. Macijeski

International Longshoremen's Association, AFL-CIO
By /s/ Thomas W. Gleason
President

Carrier:
United States Lines, Inc.
By: /s/ Robert B. Murphy

Atlantic Coast District
ILA, AFL-CIO
By /s/ Thomas W. Gleason

Carrier:
USL (SA)
By: /s/ Robert B. Murphy

South Atlantic and Gulf District, ILA, AFL-CIO
By ______________________
President

Carrier:
B.S.S.L. Inc. as agent for
Barber Blue Sea
By: /s/ F. M. Cangemi

New York Shipping Association
By /s/ James J. Dickman
President

Carrier:
B.S.S.L. Inc. as agent for
Barber West Africa Line
By: /s/ F. M. Cangemi

Council of North Atlantic Shipping Association
By /s/ William Detweiler
President

Carrier:
B.S.S.L. Inc. as agent for
Atlantik Express Service
By: /s/ F. M. Cangemi

West Gulf Maritime Association
By /s/ O. H. Hall
Chairman

Carrier:
Flota Mercante
Grancolumbiana S.A.
By: /s/ H. R. Whitehouse,
attorney in fact

New Orleans Steamship Association, Inc.
By /s/ C. D. Burns
President

Carrier:
Atlantic Container Line
By: /s/ [illegible signature]

Mobile Steamship Association
By /s/ F. D. Alspaugh
President

Carrier:
T.F.L.
By: /s/ [illegible signature]

Southeast Florida Employers Association
By /s/ R. O. White, Jr.
Chief Negotiator

Carrier:

By: ______________________

South Atlantic Employers Negotiating Committee
By /s/ James I. Newsome, Jr.
Chairman

Carrier:

By: ______________________

Carrier:

By: ______________________

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No. 84-861

IN THE

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OCTOBER TERM, 1984

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
AFL-CIO, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

MOTION TO SUBMIT BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA PARTIALLY IN SUPPORT OF THE PETITIONER

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 36.3 of the rules of this Court, the Chamber of Commerce of the United States of America ("the Chamber") respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* urging reversal of the decision of the Court of Appeals. In support of this motion, the Chamber shows as follows:

1. This motion is necessitated by the refusal of the International Longshoremen's Association, AFL-CIO, and the New York Shipping Association, Inc. to consent to the filing of a brief *amicus curiae* by the Chamber.

2. The Chamber is a federation consisting of approximately 180,000 companies, plus several thousand other organizations such as chambers of commerce and trade/professional associations. It is the largest association of business and professional organizations in the United States.

3. The Chamber regularly represents the interests of its member-employers in important labor relations matters vitally affecting those interests before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance those interests by filing briefs *amicus curiae* in a wide spectrum of labor relations litigation, including, for example, *Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397 (1976); *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975); *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368 (1974); *NLRB v. Bell Aerospace Co. Division of Textron, Inc.*, 416 U.S. 267 (1974).

4. This case presents the issue of how far unions may go in seeking to capture work to replace work lost to their members through technological innovation. Specifically, the Court must decide whether the International Longshoremen's Association ("ILA") may lawfully pressure steamship companies and stevedoring companies to disrupt their established business relationships with shippers and land surface transportation and freight-handling companies to force the latter to have certain aspects of their customary freight-handling operations performed by ILA labor at shipping docks and piers.

5. The issues in this case are of vital interest to Chamber members for at least two reasons. First, as consumers (i.e., shippers and consignees) in industries relating to the shipment of freight involving overseas transport, Chamber members are legitimately concerned that their historic ability to select the most economical and sensible means of freight shipment will be significantly hindered if the appellate court's decision is affirmed. Second, many members of the Chamber now have collective bargaining agreements with unions and virtually all members have extensive business dealings with other unionized employers. As a consequence, Chamber members may themselves be the direct or indirect objects of union pressures to modify their business arrangements in order to serve purported goals of "work preservation." Accordingly, the standards of permissible union conduct established in this case will have significant impact on Chamber members and other employers throughout the United States.

WHEREFORE, the Chamber respectfully requests that it be granted leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

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March 1, 1985

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

INTEREST OF THE *AMICUS CURIAE*

A statement describing the Chamber of Commerce of the United States of America ("the Chamber") and its interest in this case is set forth in the foregoing motion requesting leave to file this brief.

STATEMENT OF THE CASE

A. Procedural Background

This case involves the legality, under Sections 8(b)(4)(B) and 8(e) of the National Labor Relations Act

("the Act"), of the Rules on Containers ("Rules") negotiated by the International Longshoremen's Association ("ILA") and employer organizations representing various shipping and stevedoring companies ("steamship companies") that employ ILA members. On remand from this Court's decision in *NLRB v. International Longshoremen's Association*, 447 U.S. 490 (1980) ("*ILA-I*"), the National Labor Relations Board ("NLRB" or "the Board") held that the Rules were lawful in some respects and unlawful in other respects (266 NLRB 230). On review in 1984, the Fourth Circuit held that the Rules were lawful in all respects (734 F.2d 966). It is that judgment of the Fourth Circuit that is presently pending before this Court.

B. Background of Dispute

The genesis of the instant dispute was the development of containerization technology in the freight transportation industry. Because modern containers can be attached directly to truck chassis for overland transport and loaded into the holds of container ships for overseas transport, they can be "stuffed" (loaded with cargo) or "stripped" (discharged of cargo) at inland locations without individual pieces of cargo ("break bulk" cargo) ever being handled on the piers.

For years the steamship companies have leased these containers to shippers, warehouses, consolidators and trucking companies who stuff and strip them at locations away from the pier based upon instructions from the shipper or its agent. Specifically, when beneficial owners of cargo (shippers) decide to ship goods overseas, they or their agents issue instructions (normally through a bill of lading) specifying the method by which the containerized cargo is to be transported (both overland and overseas) as well as where and by whom the container will be stripped and stuffed. Those instructions normally

direct the steamship company simply to load or unload the sealed container on or off a ship.[1]

As a consequence of this technology, much of the traditional longshoremen's loading and unloading of break bulk cargo has been rendered unnecessary. In response to this erosion of longshore work, the ILA has sought to restrict the release of containers by bargaining the "Rules on Containers" with steamship companies that employ its members.

C. Evolution of Containerization and the Rules On Containers

Although the ILA's Rules restricting the use of containers are relatively new, containerization is not a new phenomenon. For years ocean-going cargo has been prepackaged in various forms, including, for example, the use of special vessels to carry railroad cars intact without pier-side handling of their contents (266 NLRB at 244). Further, in the late 1940s steamship companies began using "Conex" or "Dravo" boxes, the immediate precursors of the modern container. Although ILA labor initially stuffed and stripped these boxes at the pier, steamship companies later released these boxes to shippers for off-shore stuffing and stripping by non-ILA labor. In all of these cases, this pre-packaged cargo was allowed to cross the docks unimpeded and unhandled by ILA labor (*id.*). In other words, the longshoremen historically loaded and unloaded ship cargo as they found it, whether break bulk or pre-packaged.

By the late 1950s, however, the larger, present-day containers were in use (*id.*) and the ILA saw them as a clear threat to the work of its members (734 F.2d at 969). For example, in a 1959 report to the Union's 39th

[1] See Joint Appendix, pp. 10-11, 20, 36, 62, 69-70, 74-75, 77-79, 91-92, 101-102, 118, 123-124, 131, 137-138, 142-143, 144, 145, 192-193, 196-197. See also 266 NLRB at 261.

convention, ILA official Thomas W. Gleason noted that the effects of containerization on the union membership would be tremendous and that the ILA stood to lose up to 9,000 jobs in the New York port alone, as well as a proportionate number in other ports (i.e., 30% of its membership). Ross, *Waterfront Labor Response to Technological Change: A Tale of Two Unions*, 21 Lab. L.J. 397, 401 (1970).

The ILA's response was to demand, in 1959 master contract negotiations with the steamship companies, that all containers be stripped and stuffed on the pier by dockside ILA labor (266 NLRB at 244). However, the resulting agreement gave the steamship companies the right "to use any and all types of containers without restriction or stripping by the Union" (266 NLRB at 244, 277). In exchange, the steamship companies agreed to pay a royalty to ILA welfare funds for each container passing over the piers intact (i.e., without being stripped or stuffed).[2]

During the term of that 1959 contract, the ILA claimed that the container clause did not give the steamship companies any rights with respect to "LCL containers" (266 NLRB at 241, 245).[3] Although that proposition was doubtful under the contract language, in 1962 the steamship companies agreed to impose the first restriction on off-shore consolidation of LCL containers by stating that when a shipping company supplied a container to a con-

[2] The steamship companies also agreed that longshore labor would perform any stripping or stuffing of containers performed in the port for the steamship companies at their piers and terminals or through direct contracting out (266 NLRB at 244, 277).

[3] "LCL" means "less than container load" and is used to denote a container in which the cargo of more than one shipper or consignee is consolidated. LCLs are also sometimes called "LTL loads" or "consolidated container loads." The term "FSL containers," on the other hand, means "full shipper loads" and denotes a container in which all of the cargo is owned by one shipper or consignee. See 266 NLRB at 241.

solidator in the port area, "it will be stipulated that such container must be loaded or unloaded by ILA at longshore rates" (266 NLRB at 245).

Between 1962 and 1973 the restrictions on use of containers remained substantively unchanged. In 1962 contract bargaining the ILA again sought more restrictions on containerization, but the shipping companies rejected further restrictions, agreeing instead to establish a multimillion dollar, guaranteed income plan for ILA longshoremen (266 NLRB at 245).[4] In 1969 negotiations the parties bargained a contract clause and "Rules on Containers" which provided that LCL containers owned or leased by steamship companies which were to be stuffed or stripped within 50 miles of the port by other than the owner of the cargo were to be stuffed and stripped by ILA labor on the pier (266 NLRB at 245, 277). The 1969 contract provision and Rules remained basically the same under the parties' 1972 labor contract, but the steamship companies agreed to double the royalty paid on each container that passed over the pier intact (266 NLRB at 246, 278-279).

After maintaining basically the same restrictions on containers for eleven years, the parties' 1973 "Dublin Agreement" extended the Rules' coverage, for the first time, to "FSL containers" (i.e., "full shipper load" containers housing the cargo of only one shipper or consignee) (266 NLRB at 246). The new provision required that any stuffing and stripping of such containers within

[4] The guaranteed income plan negotiated in 1962 guaranteed 1600 hours of work for each regular longshoreman (Joint Appendix, pp. 162-163) and cost the steamship companies approximately $8,000,000 in the first year of that plan. See *Intercontinental Container Transport Corporation v. New York Shipping Association*, 426 F.2d 884, 888 (2d Cir. 1970). By the time of the 1969 agreement, each regular longshoreman received a guarantee of 2080 hours work per year (Ross, *supra*, 21 Lab. L.J. at 407), and in the year ending September 30, 1976 the guaranteed income plan cost the steamship companies $50,000,000 (Joint Appendix, pp. 162-163).

50 miles of the port must be performed by pier-side ILA labor (266 NLRB at 279).[5] The Dublin Agreement also required that shipping companies refuse delivery of their containers to those who violated the Rules and provided for the payment of liquidated damages ($1000 per container) to the ILA by steamship companies that provided containers to consolidators, warehouses or motor carriers who stripped or stuffed them in violation of the Rules (266 NLRB at 246, 280, 283).

The Rules were re-written in 1974 contract negotiations to reflect the changes contained in the Dublin Agreement (266 NLRB at 246, 281-283). Since then, the only change in the Rules' restrictions came in 1975, when the steamship companies agreed to eliminate the warehouse exception for export cargo and to limit the warehouse exception for import cargo (266 NLRB at 246-247, 284; see n. 5, *supra*). In 1977, however, the steamship companies agreed to another increase in the royalty payments to ILA for each container that crossed the pier intact (266 NLRB at 246, 285).

Thus, at present the Rules provide that if containers owned or leased by steamship companies are to be stuffed or stripped within 50 miles of the pier by anyone other than employees of the beneficial owner of the cargo, the stuffing and stripping must be done by ILA labor at the pier. Exceptions exist for FSL containers being transported intact to or from the beneficial owner and inbound FSL goods to be warehoused within the 50-mile area for at least 30 days. Finally, the Rules do not cover any container loads coming from or bound to points outside the 50-mile area (734 F.2d at 971).

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[5] Excluded from this new restriction, however, was the handling of FSL containers by employees of the beneficial owner of the cargo and by warehouse employees at bona fide public warehouses where the beneficial owner retained title to the cargo and paid storage fees for at least 30 days (266 NLRB at 246).

In summary, although the ILA initially sought significant restrictions on the use of containers in order to protect longshore jobs, what they settled for were limited restrictions but significant financial contributions by steamship companies (in the form of multi-million dollar income guarantees and royalties) to aid displaced longshoremen. Indeed, one commentator has concluded (Ross, *supra*, 21 Lab. L.J. at 418):

> Retrospectively, it would appear that the ILA's opposition to containerization was a tactical maneuver to secure even greater bargaining benefits. The results to the union and its members are impressive. . . . The winning of a guaranteed wage for 52 weeks a year in major ports for the life of the contract was an achievement of the highest magnitude. That this was accomplished in an industry dominated by intermittent employment and exposed to cyclical activity only adds lustre to the feat. At the same time, the union not only preserved its jurisdiction but extended it. These bargaining successes strengthened its leadership and had favorable repercussions on the bargaining structure on all coasts. In short, containerization and its associated labor issues were seized upon by the ILA as an opportunity to make gains on a wide front which strengthened the union at minimum cost.

D. *ILA-I*—Remand To The Board

In *ILA-I* this Court determined that the Rules and their enforcement would constitute lawful primary work preservation efforts by the ILA only if two criteria were met: (1) that the Rules and their enforcement seek to preserve traditional longshoremen's work rather than seeking to acquire other work for them, and (2) that the steamship companies who employ ILA labor, who have agreed upon the Rules and against whom the Rules are enforced, have the right to control the assignment of the work of stuffing and stripping those containers. Having determined that the Board incorrectly defined the "work

in controversy" in its earlier decisions,[6] this Court remanded the case to the Board for reconsideration of that issue and consideration of the "right to control" issue.

E. The NLRB Decision on Remand

On remand the Board defined the work in dispute as the work sought by the Rules: "the initial loading and unloading of cargo within 50 miles of a port into and out of containers owned or leased by shipping lines having a collective-bargaining relationship with the ILA" (266 NLRB at 236). The Board went on to hold that the ILA had an overall work preservation objective in negotiating the Rules and that the steamship companies had the right to control the assignment of container stuffing and stripping work. However, the Board found that the Rules had an illegal work acquisition objective as applied to two types of FSL container work in the land surface transportation industry (motor carrier "shortstopping" and traditional warehousing practices). The following is a summary of the Board's findings.

1. *Consolidation.* Both the Board and the Administrative Law Judge ("ALJ") found that the Rules could be legally applied to consolidation work—i.e., the loading or unloading of LCL containers. The ALJ found that consolidators competed directly with steamship companies with respect to this work, that this work had been diverted from the piers to consolidators by containerization and that the Rules claiming this work constituted a rational effort to return this work to the piers (266 NLRB at 252-254). The Board adopted these findings and held

[6] In its earlier decisions regarding the legality of the Rules, the Board had defined the work in controversy as the "off-pier stuffing and stripping of containers" and had concluded that the Rules were not valid work preservation agreements because the ILA had not traditionally performed off-pier stuffing and stripping. See *ILA-I*, 447 U.S. at 502-503. This definition was held erroneous as a matter of law because it would always operate to foreclose a finding of a legitimate work preservation objective (447 U.S. at 508).

the Rules lawful as applied to consolidators (266 NLRB at 235, 237).

2. *Motor Carriers and Shortstopping.* Prior to containerization, truckers picked up break bulk cargo at the pier and, if the cargo was destined beyond the port area or to multiple inland locations, they delivered the cargo to a terminal or freight station near the port where it was unloaded, sorted and re-loaded into over-the-road equipment for delivery. This activity is known as "shortstopping." After containerization, of course, the containers could be brought directly to the terminal where they, like the truck trailer before containerization, could be unloaded (266 NLRB at 255-256).

The ALJ found the Rules were unlawful as applied to shortstopping of FSL containers (266 NLRB at 255-256) because that practice was based upon the economics of surface transportation, including the larger capacity of long-distance trailers, the prevention of "dead head" runs with containers, the necessity of reloading cargo to comply with highway safety regulations, and the desire to avoid additional *per diem* charges on containers (*id.*). More specifically, the ALJ found that the cargo handling associated with shortstopping pre-existed containerization, was not created or increased by containerization and was not fairly claimable by the ILA (*id.*).

The Board adopted the ALJ's conclusion that the application of the Rules to shortstopping had an illegal work acquisition motive, but it relied on the fact that "after containerization, some of the traditional loading and unloading work of the longshoremen, which had historically been duplicated by trucking . . . employees, essentially was eliminated" (266 NLRB at 237).

3. *Warehousing.* The Board adopted the ALJ's finding that the Rules could be lawful or unlawful with respect to warehouse work, depending upon the circumstances. The ALJ found that the public inland warehouse "has al-

ways provided an intermediate freight distribution service whereby cargo could be stored for a term dictated by the owner's market demand" and that the container did not change the method of handling freight except that the truck trailer equipment was supplanted by a container (266 NLRB at 257). Thus, he found that when warehouses stripped incoming FSL containers and stored the cargo for indefinite periods as dictated by owner demands, or when they stored inventoried goods for owners and stuffed containers with those goods for shipment when the owner directed, they were serving functions that were not created by containerization, those functions posed no threat to historic ILA work and the ILA's efforts to acquire that work were unlawful (266 NLRB at 257-259). However, where warehouses merely serve as stripping or stuffing stations for cargo, the Rules could be legitimately applied because the "[p]rovision of such services by warehousemen is tantamount to the establishment of offshore container stations in competition with those at dockside and constitutes an incursion on ILA labor not justified by pre-container warehousing practices" (266 NLRB at 257).

The Board adopted the ALJ's findings and conclusions regarding the Rules' application to warehousing, but found that the illegal work acquisition object of the Rules and their enforcement stemmed from the fact that the new container technology had eliminated the duplicative work of longshoremen as a step in the cargo handling process (266 NLRB at 236-237).

4. *Right To Control.* The ALJ and Board both concluded that the steamship companies, who owned or controlled all the containers to which the Rules apply, could control the assignment of stripping and stuffing work because they could simply require in their leases of containers that their lessees have them stuffed and stripped at the pier with ILA labor (266 NLRB at 234, 260-261).

Accordingly, the Board held that those parts of the Rules that sought only to preserve traditional longshoremen's work could be lawfully enforced against the steamship companies.

F. The Court of Appeals Decision

The Fourth Circuit found that the Rules were legal in all respects and refused to enforce the Board's orders (734 F.2d 966). The court held that the Board erred as a matter of law in concluding that, as applied to shortstopping and traditional warehouse functions, the Rules had an unlawful work acquisition motive (734 F.2d at 979). According to the court, that conclusion could only be supported by a finding that the Rules deprived truckers and warehousemen of their work, a finding nowhere specifically made by the Board (*id.*). The Fourth Circuit also agreed with the Board's conclusion that the steamship companies had the power to control the assignment of stuffing and stripping work by reason of their ownership of the containers and, accordingly, that the Rules and their enforcement were lawful.

SUMMARY OF ARGUMENT

The Board was clearly correct in deciding that the ILA may not lawfully seek to acquire container handling associated with shortstopping and basic warehousing work. It is true that such work is physically like the work traditionally done by longshoremen, but it is functionally unrelated to the shipment of goods by sea. Loading break bulk cargo on railcars in Denver or warehousing it in Des Moines is also physically like the work of longshoremen, but because it has nothing to do with sea travel, no one, including the ILA, claims that work. The Board was therefore correct in concluding that the same is true of container loading and unloading within 50 miles of a port when that work relates to traditional inland cargo handling or transport rather than overseas transport.

Further, the Court of Appeals was just as clearly wrong in requiring a specific finding that inland employees would be deprived of work, because such a finding is not legally necessary and, in any event, such employees will undoubtedly be deprived of work.

The Board's conclusion is further supported by the Act's basic secondary boycott prohibitions, which, if properly applied, render the Rules and their enforcement totally invalid. And this conclusion is true even if one assumes (incorrectly) that the work sought by the Rules is traditional longshore work. Specifically, the Board and court below became so mired in questions relating to traditional longshore work that they overlooked the basic principles of the Act's secondary boycott provisions and superficially analyzed the "right to control" doctrine. Both found that the steamship companies own the containers and, therefore, that they can control the assignment of container work by refusing to continue leasing containers to those who actually control that work assignment unless the latter agree to assign the work to ILA labor. The trouble with that holding is that it defines a classic secondary boycott violation rather than the facts necessary to meet the "right to control" test. Under the latter doctrine, an employer must have the power to assign work without first disrupting a business arrangement with another in order to gain that work assignment power. However, the Rules in this case pressure the steamship companies first to cease doing business with those who control the container work so that the latter will cede the work to the docks. Accordingly, even if the Rules have an ultimate work preservation objective, they have "an" object of disrupting a business arrangement. As such, the Rules and their enforcement violate Sections 8(b)(4)(B) and 8(e) of the Act.

Finally, too much emphasis has been placed in this case on the negotiated Rules, and not enough on the bargaining between the ILA and steamship companies that has

produced legitimate, primary, economic protection for displaced longshoremen through royalty payments and guaranteed income plans. Collective bargaining is not well served by disregarding the massive financial contributions steamship companies have agreed to make in exchange for the free use of container technology and by now legitimizing the ILA's efforts to gain work which, if it ever was ILA work, was lost years ago.

ARGUMENT

A. The Board Correctly Held That The Rules Do Not Have A Lawful Work Preservation Objective As Applied To Shortstopping And Traditional Warehousing Functions

The Court of Appeals rejected the Board's conclusion that the Rules had an unlawful work acquisition objective as applied to shortstopping and traditional warehouse functions for the sole reason that there was no specific factual finding that the ILA's efforts to obtain this work would actually deprive truckers and warehousemen of their off-pier work. According to the court, the longshoremen's work would merely duplicate the off-pier work of these inland workers and, hence, would not diminish or eliminate their work (734 F.2d at 979). As we show below, the Board's determinations were correct for at least three reasons, and its orders based on those determinations should be enforced.[7]

[7] Although the Chamber supports the Board on these findings, it does not agree with the Board's determination that the Rules had a lawful work preservation objective as applied in other contexts. For example, the Chamber questions how the Rules can lawfully be applied to any FSL container work when the Rules do not apply to FSL containers stuffed or stripped by employees of the beneficial owners of cargo (presumably because this was not traditional ILA work). There is no reason that such work should suddenly be converted to traditional longshore work merely because the beneficial owner chooses to subcontract the work to consolidators, warehouses or motor carriers. In addition, the Chamber agrees with the Ameri-

First, contrary to the Fourth Circuit's reasoning, the Chamber is aware of no requirement that other employees actually have to be deprived of work before an unlawful work acquisition motive can be found. Indeed, the law is to the contrary. For example, in *Associated General Contractors of California v. NLRB*, 514 F.2d 433, 436 (9th Cir. 1975), the union claimed that its contractual work preservation clause required the subcontractor to permit union members to dismantle and refabricate the piping on prefabricated sinks that were to be installed at the jobsite. Although the union obviously sought only to duplicate the work of employees of the sink manufacturer, the court had no trouble finding that the union had a secondary objective because it "was trying to acquire work performed by employees of [the sink manufacturer]" (514 F.2d at 438). By the same token, it was clearly error for the Fourth Circuit in the instant case to foreclose a "work acquisition" finding on the ground that the ILA merely sought to duplicate the off-pier work of truckers and warehousemen.[8]

Second, even if work deprivation were a necessary element for finding a work acquisition objective, it is clear

can Trucking Association's contention that none of the work sought by the Rules is functionally and historically related to traditional longshore work because the work has been integrated into an intermodal transportation system.

[8] In addition, of course, it can be said with some legitimacy that the phrase "work acquisition," like other terms used in the area of secondary boycott law (e.g., "work preservation"), is really just a label used by the Board and courts to denote the conclusion that the work in question may not permissibly be claimed by the boycotting union. In this regard, it appears that in the *ILA-I* decision this Court specifically contemplated that on remand the Board might find the Rules unlawful because the longshoremen's work at the pier "has been completely eliminated" (447 U.S. at 511-512). If a finding of work elimination (the Board's underlying premise) is sufficient to render the Rules unlawful, then it matters not whether the Board labeled the Rules "work acquisition" as a result of that finding.

that such deprivation will, in fact, result in this case. The Fourth Circuit recognized that longshoremen's work at the pier would merely be an unnecessary duplication of the work of truckers and warehousemen (734 F.2d at 979), and it was obviously troubled, as were some members of this Court earlier, by this "invidious form of 'featherbedding.'" See 447 U.S. at 526-527 (dissent). Unlike the Board, however, the appellate court failed to appreciate the logical and inevitable implications of these facts. On the contrary, the court simply assumed that because such duplication could occur, it would occur. However, economic and competitive reality dictates a different result.

Cargo handling, of course, is an expensive proposition, both in terms of paying for the work and in terms of the possibility of pilferage, loss and damage to the cargo during each handling. Indeed, containerization technology developed and flourished in part because it decreased the necessity for such handling (see 447 U.S. at 494-495). Faced with the Rules' mandate that cargo shortstopped or warehoused within 50 miles of the pier *must* be handled on the docks, the rational business person will develop alternative practices and procedures to avoid the costs involved in duplicative handling. For example, shippers may choose to have their cargo handled *only* at the docks if they must pay (both in terms of labor costs and cargo losses) to have it handled there in any event. Alternatively, shippers may decide to have their cargo warehoused or shortstopped outside the 50-mile limit or, if possible, to avoid those services entirely. Finally, by way of example, shippers with slim profit margins who cannot economically avail themselves of these alternatives may choose to cease importing or exporting completely.

Although there may be other examples of shipper adjustments to avoid the duplicative costs imposed by the Rules, they would all, we submit, share one common feature in a competitive economy such as ours: a removal

of duplication at the only place it can be removed under the Rules—i.e., the warehouses and trucking stations within the 50-mile limit.[9] As a result, the Fourth Circuit was clearly wrong in holding that there could be no work acquisition objective here because the Rules as applied to shortstopping and warehousing would not deprive truckers and warehousemen of work.

Third, the Board's work acquisition determinations were correct because the stuffing and stripping in issue are not "functionally and historically" related to traditional longshore work in the sense intended by this Court's decision in *ILA-I* (447 U.S. at 510). The ALJ addressed the standards enunciated by this Court when he stated (266 NLRB at 256; footnote omitted):

> [T]he practice of shortstopping is rooted in traditional motor carrier transport cargo handling procedure, which is performed by motor carriers for their own benefit and convenience . . . [and which] has no relevance to the marine leg of the intermodal [transportation] network. Although skills utilized therein are indistinct from those of deep sea longshoremen in the performance of their traditional duties, it is work assumed for a different purpose, and in a different segment of the transportation industry. Short-stopping is simply a carrier-oriented, as distinguished from consumer-oriented, service, and as such neither competes with marine cargo handling nor amounts to a subterfuge to oust longshoremen of their traditional work. To this extent, upon delivery of a container to a motor carrier, the seaborne leg ends, the container becomes a substitute for the trailer or van, and work beyond this interface was neither created by containerization nor does it make inroads on that traditionally made available to deep sea ILA labor by marine operators.

[9] In *Retail Clerks Union, Local 770, AFL-CIO*, 145 NLRB 307 (1963) (*"Retail Clerks"*), the in-store employees' union, claiming a work preservation object, sought the work of stocking merchandise performed by the employees of independent rack-jobbers. The Board recognized that the demands of the in-store union could be met by simply allowing its members to redo the rack-jobbers' work. However, the Board concluded that the increased costs associated with that duplication made it likely that the store owners would change their arrangements with rack-jobbers instead and, accordingly, that the union had an illegal cease doing business object.

Similarly with respect to warehousing (266 NLRB at 257-258), the ALJ found that the Union could not claim container handling which is integrated into "traditional warehouse functions" (e.g., indefinite storage, inventory services, special cargo handling or packaging, etc.) for the following reasons (266 NLRB at 257):

> [T]he container afforded no change in the warehousemen's method of handling inbound freight, but simply reflected a change in equipment through which the truck trailer was supplanted by the container.
>
> The container-handling services afforded by warehousemen as outlined above are and have been integrated into a surface system of transportation which was not created by containerization, and poses no threat to the historic work jurisdiction of the ILA.

In short, the ALJ found that where ILA work had not been diverted from the piers, the physically similar work of inland employees which pre-dated containerization and was not changed by that technology could not be legitimately claimed by the ILA.

These analyses, we submit, are the essence of the "functional and historic relationship" test envisioned by this Court in 1980.[10] The functional relationship between

[10] Although the ILA has apparently contended that this Court's earlier decision forecloses consideration of work patterns in inland transportation industries, the Chamber believes that this is a far too restrictive reading of *ILA-I*. Indeed, this Court directed the Board to consider the "traditional work patterns" that the ILA seeks to preserve (447 U.S. at 507) and noted that the legality of the Rules would depend on how closely they are tailored to preserv-

traditional longshore work and the inland employees' cargo handling is nil—i.e., the work is pursued for different purposes in different segments of the intermodal transportation system. The historical relationship is similarly non-existent—i.e., the longshoremen never performed work of this nature in the past.

Moreover, this analysis formed the fundamental predicate for the Board's finding that the longshoremen's work was eliminated with respect to shortstopping and traditional warehouse practices. The Board phrased its conclusion in terms of elimination of longshore work rather than in terms of the fact that containerization did not change the work of truckers and warehousemen. Nevertheless, the underlying premise is the same: since work has not been diverted to the inland employees and since there is no additional handling necessary at the pier, the longshoremen's work has been eliminated. Thus, the Board's conclusion is premised upon an analysis that fully incorporates the standards enunciated by this Court,[11] and the Fourth Circuit's contrary judgment should be reversed.

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ing "the essence of the traditional work patterns" (447 U.S. at 510 n. 24). Such "patterns," we submit, cannot be ascertained in a vacuum. Rather, the contours of the ILA's traditional work patterns can be determined only by evaluating the cargo handling responsibilities of longshoremen *and* land surface personnel before containerization developed and by considering how containerization changed those responsibilities. Indeed, we think the Court contemplated this kind of comparative analysis when it admonished the parties that the appropriate analysis requires more than simply deciding whether a container is more like a ship's hold or more like a big box (447 U.S. at 509 n. 23).

[11] Inexplicably, both the Board and the Fourth Circuit stated that the ALJ had found that work claimed by the Rules with respect to shortstopping was functionally related to traditional longshore work (see 266 NLRB at 235; 734 F.2d at 976). No such finding was ever made by the ALJ, and in fact, his discussion of shortstopping quoted in the text shows that he did *not* find the work to be functionally related to traditional longshore work. The Board apparently meant that the ALJ had found the basic elements of the shortstopping work to be *physically* similar to longshore work—which he did (266 NLRB at 256). However, it seems clear that this Court did not intend the work preservation analysis to turn on the physical aspects of the work in question. *See* 447 U.S. at 509 n. 23. Accordingly, the Board's misstatement of the ALJ's finding should have no impact on the outcome of this case.

B. The Board's Order Should Also Be Enforced Because The Steamship Companies Did Not Have The Right To Assign Any Of The Work Sought By The Rules[12]

The Board and court below, like other tribunals that have considered the legality of the Rules, became so caught up in the complexity of determining what was traditional longshore work that they apparently lost sight of the Act's basic secondary boycott principles. Specifically, both found that the Rules had an overall and ultimate work preservation objective (266 NLRB at 236; 734 F.2d at 978), but they failed to look further to determine whether the Rules and their enforcement revealed other, unlawful, secondary objectives. And that oversight seems to have been the result of their misapplication of the "right to control" doctrine. Accordingly, we turn here to basic secondary boycott principles as we understand them.

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[12] We recognize that this argument may technically go beyond the limited issues on which this Court has granted certiorari in this case in the sense that acceptance of our position on the "right to control" doctrine would invalidate the Rules totally, not just in the limited areas found by the Board. However, this Court in *ILA-I* specifically directed the Board to deal with this issue on remand. Further, our argument here clearly provides additional support to the Board's position before this Court that the Fourth Circuit's decision should be reversed. Finally, this Court now has pending before it petitions for certiorari by other parties in this case which specifically raise the right to control issue (e.g., Case Nos. 84-677, 84-691 and 84-696), and the Board (whose petition is now being considered) has urged this Court to grant those pending petitions in order to resolve all issues relating to the Rules and their application (see Petition of the NLRB in Case No. 84-861 at 22, n. 8 and accompanying text).

Section 8(b)(4)(B) prohibits secondary boycotts, including a union's use of threats, coercion or restraints against one employer where *"an"* object of that conduct is to convince that threatened employer to cease doing business with another employer,[13] normally so that the latter employer will resolve its dispute with the threatening union. See, e.g., *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612 (1967) (*"National Woodwork"*); *NLRB v. Pipefitters*, 429 U.S. 507 (1977) (*"Pipefitters"*); *Retail Clerks, supra; International Longshoremen's Association, supra*, 137 NLRB 1178. That section, however, prohibits only "secondary" cease doing business objects, and does not prohibit a strike or picketing of an employer with whom the picketing union has a dispute, even though the incidental effect of that picketing is to cause others to cease doing business with the picketed employer.

[13] Even if a union's conduct has some lawful objectives, the conduct is illegal if *one* of its objects is the cessation of business. *NLRB v. Denver Bldg. and Constr. Trades Council*, 341 U.S. 675, 688-689 (1951).

In addition, it is clear that 8(b)(4)(B) is violated even if an object of the union is something less than a total cessation of business. Indeed, where an object is a change in a business relationship, the 8(b)(4)(B) "cease doing business" requirement is met. Accordingly, the fact that steamship companies in the instant case can fulfill the ILA's desires by simply changing their leases to require that containers be stuffed and stripped by pier-side ILA labor is of no moment, for such a change constitutes a "cessation of business" within the meaning of 8 (b)(4)(B) and 8(e). *NLRB v. Operating Engineers*, 400 U.S. 297 (1971); *Retail Clerks, supra*; *International Longshoremen's Association*, 137 NLRB 1178 (1962), *enf'd in relevant part*, 331 F.2d 712 (3d Cir. 1964). Further, of course, the Rules at issue in this case specifically provide that the steamship companies are totally to cease leasing containers to consolidators and deconsolidators and to any others who do not ensure that stuffing and stripping are done by pier-side ILA labor (266 NLRB at 246, 282). That objective, even if it is only an alternative to the steamship companies changing their lease terms, still violates Sections 8(b)(4)(B) and 8(e). E.g., *Retail Clerks, supra.*

For example, a union may picket employer "X" in furtherance of its demands for higher wages in a new labor contract, even though that picketing may cause X's supplier ("Y") to cease delivering supplies to X. In those circumstances, it is presumed that the union's object is to convince X (who has the power directly to grant wage increases) to settle its dispute with the union, and that the cessation of Y's business with X is but an incidental effect of the union's picketing. However, that same union may not picket Y in order to cause it to cease doing business with X, even though the union's ultimate objective is primary and lawful—the settlement of the union's primary wage dispute with X. That result obtains because Y (who has no power to raise the wages of X's employees) cannot resolve the union's dispute. Under these latter circumstances, "an object" of the union's picketing is illegal—that is, the cessation of business between Y and X—and that picketing is not made legal simply because another of the union's objects (its ultimate object) is lawful.

Section 8(e) of the Act prohibits the same kind of secondary objective, but substitutes an agreement between a neutral employer and a union for the threats, coercion or restraint prohibited by Section 8(b)(4)(ii)(B). *National Woodwork, supra.* For instance, if the union in our example above declined to picket Y, but instead obtained an agreement from Y to cease doing business with X, then Section 8(b)(4)(ii)(B) would not be violated because the union engaged in no prohibited conduct. However, Section 8(e) would be violated because Y and the union would have entered into an agreement with "a" secondary cease doing business objective—and that conclusion applies even though the union's ultimate object was the lawful and primary desire to resolve its dispute with X. E.g., *National Woodwork, supra; Pipefitters, supra.*

Thus, the key to an 8(b)(4)(B) or 8(e) violation is that "an" object of the union's conduct or agreement is to convince a neutral employer (who does not have the ability to meet the union's demands) to cease doing business with another employer who can meet the union's demands. And from the earliest days of the Board's consideration of secondary boycott cases, that same analysis has applied in the form of the right to control doctrine in so-called work preservation cases, such as the instant case.[14]

The Board's analysis, of course, has been confirmed by the decisions of this Court. In *Pipefitters, supra,* a plumbing subcontractor was awarded a contract by a general contractor to install factory pre-piped, climate-control units on a construction jobsite. Traditionally, the plumbing union that represented the subcontractor's employees had performed all pipe fitting on construction jobs. When the pre-piped units arrived on the jobsite, the union-represented employees refused to install them (struck) until and unless they were given the task of threading, cutting and connecting all pipes in the units. This Court affirmed the Board's finding of an 8(b)(4)(B) violation. Although the plumbing union's ultimate object may have been to preserve work for its members (429 U.S. at 521 n. 8 and accompanying text), where the union's members struck their plumbing subcontractor employer who did not control the work assignment, *"an"* object of that strike was to pressure the subcontractor to pressure, in turn, the general contractor so that the latter would cause the piping work to be assigned to members of the plumbing union. And that object, which directly sought a change in the business relationship between the plumbing subcontractor and the general contractor, was violative of 8(b)(4)(ii)(B).[15]

Pipefitters distinguished the Court's earlier decision in *National Woodwork,* where the Court had held that the carpenters union could lawfully pressure a subcontractor

[14] For example, in *Retail Clerks, supra,* Local 770 had a labor agreement with an association of market employers. That agreement provided that all clerks' work performed on store premises would be performed by bargaining unit employees. The market owners purchased goods from distributors ("rack-jobbers") who, under their agreements with the market owners, placed, replenished and arranged their goods on the market shelves. The clerks' union struck the market owners, claiming the work done by the distributors was theirs (the clerks'), and defended secondary boycott charges on the ground that they were simply seeking to preserve traditional bargaining unit work. The Board concluded that the clerks' strike violated what is now Section 8(b)(4)(B). The Board held that even though the markets owned the stores and, accordingly, could have controlled access to the work to ensure that all "clerks' work" was assigned to their (the markets') employees, it was necessary for the markets to first alter or terminate an existing business relationship with the distributors before they (the markets) could assign the work to their employees. Thus, the union's strike, although ultimately aimed at preserving unit work, sought that work from employers (the markets) who did not have the power to assign it without first disrupting a business relationship. Accordingly, "an" object of the strike was prohibited and Section 8(b)(4)(B) was violated. See also *International Longshoremen's Association, supra,* 137 NLRB 1178.

[15] See 429 U.S. at 514 ("[The union] was exerting prohibited pressure on [the plumbing subcontractor] with *an* object of either forcing a change in [the general contractor's] manner of doing business or forcing [the plumbing subcontractor] to terminate its subcontract with [the general contractor]." (Emphasis added.)); 428 U.S. at 528 and n. 16 ("The issue is whether 'an object' of the inducement and the coercion was to cause the cease-doing-business consequences prohibited by § 8(b)(4) . . . . There are circumstances under which the union's conduct is secondary when one of its purposes is to influence directly the conduct of an employer other than the struck employer. In these situations, a union's efforts to influence the conduct of the nonstruck employer are not rendered primary simply because it seeks to benefit the employees of the struck employer."). See also *ILA-I,* 447 U.S. at 504-505 (If an employer pressured by a union to preserve the work of its members does not have the right to give employees the work in question, "it is reasonable to infer that [the union] has *a* secondary objective, that is, to influence whoever does have such power over the work." (Emphasis added.)).

to assign its employees the work of finishing doors on the jobsite even though the incidental effect of that work assignment would be the subcontractor's cessation of business with the manufacturer of pre-finished doors. The difference, according to the *Pipefitters* Court, was that in *National Woodwork* "the struck [subcontractor] . . . was faced with the choice of either giving the cutting and fitting work to its own employees or giving it to the door manufacturer" (429 U.S. at 528 n. 16). Thus, although the incidental effect of that work assignment was that the subcontractor would cease doing business with the door manufacturer, the union did not need to put pressure on the manufacturer or any employer other than the primary carpentry subcontractor to gain its sought-after work assignment. Under these circumstances, the Court had sustained the Board's finding that "the union's *sole* object" was to influence the carpentry subcontractor "to give the work to its own employees" (429 U.S. at 528 n. 16; emphasis in original).

This case fits squarely within the *Pipefitters* category.[16] Here it is the owners of goods being shipped, or their agents, who specify where and by whom containers will be stuffed and stripped (see n. 1, *supra*). Indeed, the ALJ, the Board and the court below did not dispute the contention that "it is . . . the shipper, importer, or their agents, not the steamship companies, . . . who specify the manner in which the containerized cargo is transported both on its seaward and surface journeys, as well as who strips and stuffs containers" (266 NLRB at 261).

Despite this fact, both the Board and court found that the steamship companies had the ultimate right to control the assignment of work because they own the containers and can require, in their leases, that they be

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[16] We assume, for the sake of this argument only, that the work sought by the ILA is traditional longshore work that it can lawfully seek to preserve for its members. This assumption, of course, is not true, at least as to shortstopping and traditional warehousing work.

stuffed and stripped by ILA labor at the pier (266 NLRB at 234,; 734 F.2d at 978). This "analysis" under the right to control doctrine, we submit, is wrong as a matter of law. The issue under the right to control doctrine is who controls the assignment of work, not (as the Board and court concluded) who has the economic or business muscle to wrest that control from another.[17] Here the steamship companies admittedly own the containers, but that fact means only that they are in a monopolistic position and able to exert market power by withholding containers from those who do not do as the ILA demands.[18] The ILA's pressure on the steamship companies clearly is *not* to force those companies to buy their container handling labor from the ILA rather than from warehouses, motor carriers and consolidators—which was the case in *National Woodwork*—because it is shippers, not steamship companies, who are buying labor from these inland companies. Like the union's pressure in *Pipefitters*, the ILA here is pressuring the steamship companies to cease renting containers to inland freight-handlers so that the latter will agree to have the containers stuffed and stripped by longshoremen on the dock. Thus, the ILA's object here is no more lawful than was the union's object in *Pipefitters*.

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[17] The Board and Circuit Court also rejected the claim that the requirements of the Federal Maritime Commission precluded steamship companies from conditioning the lease of their containers on the lessee's use of ILA labor to strip and stuff them. The Chamber does not address this issue because it is our contention that, even if no such requirements bind the steamship companies, they still do not control container work assignments in the sense necessary to protect the ILA's Rules and their enforcement from a finding that they violate Sections 8(b)(4)(B) and 8(e) of the Act.

[18] In *Pipefitters, supra*, the Court noted that the union's pressure could effectively regain piping work for its members because the union controlled the labor supply in the construction market and no pre-piped units could be installed without the union's assistance (429 U.S. at 524 n. 12). Nonetheless, the union's refusal to install the pre-piped units was found violative of Section 8(b)(4)(B).

This result does not change because of any vague notions that the steamship companies are "offending employers" even if they don't control assignment of the work. For example, contrary to the ALJ's suggestion, the ILA's objectives do not become primary merely because the shipping companies' practice of charging less to handle consolidated goods than break bulk cargo may have had the effect of diverting stuffing work from their employee unit (266 NLRB at 253-254). Clearly it costs those companies less to handle containers, and the more rapid loading and unloading of containers to and from ships increases the utilization of those companies' ships (266 NLRB at 232). Thus, the lower charge simply reflects economic reality, not a hidden scheme to deprive ILA labor of work.

Similarly, the ILA's secondary objective cannot be converted to a primary objective based upon the contention that the business relationships involved in the steamship companies' rental of containers to shippers and their agents developed in contravention of the Rules. Aside from the fact this contention, if true, would not validate the Rules,[19] the facts discussed earlier in this brief reveal that these business relationships evolved as the ILA acquiesced in their development. In particular, the facts show that from 1958 (when the ILA knew that containerization threatened traditional ILA work) through 1962, the ILA agreed to the free use of containers. Further, from 1962 until 1973 the ILA, in exchange for

[19] In most "right to control" cases the business relationship sought to be disrupted by a union develops in contravention of the union's claims to traditional work. Indeed, the relationship normally develops in direct conflict with a specific contractual claim by the union to the work in issue. See, e.g., *Pipefitters, supra*; *Retail Clerks, supra.* Despite that fact, the union's pressure to disrupt that relationship violates 8(b)(4)(B), at least as long as other persons (here the shippers or their agents) continue to insist upon controlling the work assignment. E.g., *IBEW, Local 501 (Atlas Construction Company)*, 216 NLRB 417 (1975), *enf'd*, 566 F.2d 348 (D.C. Cir. 1977).

royalty and guaranteed income commitments, agreed to limited restrictions on consolidated containers only. Thus, the ILA basically agreed for close to fifteen years that the steamship companies could lease their containers to others to be stuffed and stripped away from the port by labor selected by the shipper, the warehouse, the trucking company, or their agents. And it was in this atmosphere that the business of leasing containers developed. See, e.g., Joint Appendix, pp. 55, 56, 68, 87, 135.

In conclusion, the Rules and their enforcement are directed at steamship company employers who do not control the assignment of container stuffing and stripping work. As such, they violate Sections 8(b)(4)(B) and 8(e) of the Act. The ILA may be free to demand of steamship companies the traditional longshore work those companies have the power to assign, but the ILA may not pressure those companies to disrupt business relationships to capture from others the right to assign work to ILA longshoremen. This conclusion is not only correct in law, but it makes sense in practice—it returns ILA labor to its traditional task of loading ships with cargo as it comes to them and it allows steamship companies and the ILA to devise ways in which to compete in the market place (rather than in the courts) for that work.

C. Collective Bargaining Considerations Support A Reversal Of The Circuit Court's Decision

This Court stated in *ILA-I* that judgments concerning the legality of the Rules should take into account that they are the product of collective bargaining, and that Congress has shown a preference for bargaining as "the method for resolving disputes over dislocation caused by the introduction of technological innovations in the workplace" (447 U.S. at 511). Congress has not, however, shown a preference for the bargaining of illegal 8(e) agreements which disrupt existing business relationships. Indeed, Congress has outlawed such bargains. Accordingly,

if the Rules have a secondary object, they should not be judged less harshly merely because they were collectively bargained. *Local 1976, U.B.C. & J. v. NLRB (Sand Door)*, 357 U.S. 93 (1958).

Nevertheless, collective bargaining of *lawful* agreements is the preferred method of resolving most labor disputes, including those over dislocations resulting from technological innovations. Upholding the legality of the Rules in this case, however, will discourage, rather than promote, such legitimate bargaining. We illustrate with two examples.

Since 1962, when only limited restrictions on consolidated container loads (LCL) were bargained, the steamship companies have agreed in bargaining to extensive financial contributions in the form of royalty payments and multi-million dollar work guarantees to cushion the loss of longshore work resulting from containerization. In fact, although the Board held to the contrary (266 NLRB at 234, 259-260), it appears that the ILA knowingly abandoned any claims it may have had to the stuffing and stripping of FSL containers (which were untouched by the Rules until 1973) in exchange for financial commitments from steamship companies to longshoremen.[20] Having reached that accommodation, it would disserve the bargaining process to hold now that the ILA may renege on its earlier bargain, attempt to capture that work and, in the process, reduce the value of steamship company investments in containers and dislocate countless business relationships and employment opportunities that developed over at least a 15-year period. Indeed, to allow such belated work captures may act as

[20] See, e.g., *Intercontinental Container Transport Corporation v. New York Shipping Association*, 426 F.2d 884, 888 (2d Cir. 1970); *International Longshoremen's and Warehousemen's Union (California Cartage Company, Inc.)*, 208 NLRB 994, 996 (1974), *enf'd mem. sub nom. Pacific Maritime Association v. NLRB*, 515 F.2d 1018 (D.C. Cir. 1975).

a substantial disincentive to bargaining by employers in other industries undergoing technological change. Specifically, an employer will have little incentive to fund job or income guarantees, supplemental unemployment benefits, early retirement plans or other financial aids to its employees who may be displaced by technology important to that employer's future, when, years later, those employees may enforce a demand that their employer discard its investments in technology and return lost or even new work to them.

Finally, there is another way in which bargaining in the longshore industry may legitimately serve the interests of the ILA and the steamship companies. Container stuffing and stripping, like most businesses, is competitive on the basis of price and quality. Presumably most stuffing and stripping is now performed away from the pier because the consolidators, truckers and warehousemen who perform that work can do it cheaper, faster and/or better than ILA labor at the pier. If the ILA and those who employ its members want that work, they may bargain special labor agreement provisions that will enable them to win the competition for that work. Certainly such bargaining is preferable to the present attempt by the ILA to gain work by directly disrupting business relationships that have developed over the years. And, we submit, Congress recognized that reality when it enacted the Section 8(e) and 8(b)(4)(B) prohibitions against enforcement of such disruptive agreements.

CONCLUSION

For the foregoing reasons we respectfully submit that the Fourth Circuit's decision in this case should be reversed and the Rules on Containers and their enforcement should be declared violative of Sections 8(e) and 8(b)(4)(B) of the Act.

Respectfully submitted,

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No. 84-861

In the Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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EXCERPTS FROM JOINT APPENDIX (5 VOLUMES) FILED WITH U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

12-6-80

AGREEMENT BETWEEN MANAGEMENT AND ILA

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1. Parties agree that the Rules on Containers will be placed in effect on January 1, 1981 in all ports from Maine to Texas, except in Philadelphia where an application for reconsideration will be made promptly.

2. In the event an injunction is issued in any port where the Rules have been placed in effect, or the Petition for Reconsideration in Philadelphia is denied, the ILA shall have the right to give the 60 day notice provided in paragraph 8 of the Containerization Agreement.

3. Any carrier who diverts cargo from one port to another to avoid the Rules shall, in addition to any other penalties, pay liquidated damages of $500 per container to the Pension Fund and $500 per container to the Welfare Fund.

4. The parties agree that counsel shall prepare an assessment agreement whose purpose shall be to encourage the stuffing and stripping of containers at on-pier facilities by reducing pier costs and improving productivity with the cost of such program to be borne by containerized automated cargo which would have been stuffed or stripped on pier if the Rules were in effect. Such program is to be an amendment to JSP, is to be submitted within 30 days of this date and is to be in operation only in the event the Rules are unenforceable.

NEW YORK SHIPPING ASSOCIATION, INC.	INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO
By: /s/ James J. Dickman President	By: /s/ Thomas W. Gleason President

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS

By: /s/ Illegible
President

/s/ Thomas P. Kelly
Secretary

WEST GULF MARITIME ASSOCIATION

By: /s/ Illegible
President

SOUTHEAST FLORIDA EMPLOYERS ASSOCIATION

By: /s/ Illegible
President

MOBILE STEAMSHIP ASSOCIATION, INC.

By:
Administrative Chairman

ATLANTIC COAST DISTRICT, I.L.A., AFL-CIO

By: /s/ Illegible
President

Walter L. Sullivan
Secretary

SOUTH ATLANTIC AND GULF COAST DISTRICT, I.L.A., AFL-CIO

By: /s/ J. H. Raspberry
President

/s/ Illegible
Secretary

Dated: Bal Harbour, Florida
December 6, 1980

AFFIDAVIT

COMMONWEALTH OF VIRGINIA
CITY OF CHESAPEAKE

I, James R. Clark, Jr., being first duly sworn state the following of my own personal knowledge and belief.

I am the Terminal Manager of Wilson Trucking Corporation's truck terminal located at 1128 Cutlas Road, Norfolk, Virginia. I have been Terminal Manager for approximately three years. Prior to this, I was employed by the Company as Terminal Manager at a terminal located in Lynchburg, Virginia. I have worked for the Company for four years.

Wilson operates two facilities from which it serves the Port of Hampton Roads. One is the Cutlas Road facility, the other is located in Hampton, Virginia. The Newington facility serves the Baltimore Port. The Company operates a long-haul freight transportation business. It has operating authority in five states.

The Norfolk facility consists of two buildings, one housing a shop in which Wilson's equipment is serviced to keep it roadworthy. The second building houses an office area and a large cargo storage area. There are approximately forty-five doors to which trucks can back up and unload or load cargo. Covered loading docks, the height of the tailgate of the truck, facilitate this loading and unloading. A diagram of this facility is attached as Exhibit A.

The Hampton facility is similar in structure to the Norfolk facility, although much smaller. The facility has only twenty loading dock doors.

Wilson employs approximately 110 employees at its Norfolk facility. These employees are not represented by a union.

In 1979, Wilson hauled 9,277 metric tons of containerized import general cargo from the Port of Hampton Roads. This amount constituted eighty percent of all im-

port general cargo hauled by the Company from the pier. One hundred percent of the containers were full shippers' loads, containers filled with the goods of one shipper. Of these import containers, we stripped about eighty-four, or around ten percent, at our Norfolk facility.

In 1979, ninety and one-half percent of the general cargo hauled to the pier for export was containerized. Almost all of these containers were full shippers' loads. Of these, fourteen were stuffed by the Company at its Norfolk facility.

With reference to import containers, Wilson strips full shippers' loads for various reasons. Wilson will in most cases not deliver twenty-foot containers to non-local consignees. It will instead strip the container and consolidate the cargo with cargo destined to the same location. Wilson would also strip the container to enable it to handle backhauls filling conventional motor carrier equipment. Many times Wilson discovers after it has hauled the containers to its facility that the container is not safe for over-the-road transport. Lock downs might break, break linings might be cracked or the brake slack adjusters might not be working properly. Wilson would strip the containers and load it into its own equipment.

With respect to export cargo, Wilson would stuff containers for both convenience and as a service selected by a customer. In the event of late availability of a container, the customer will ask Wilson to pick up export cargo at the customer's facility and stuff it into containers at Wilson's terminal. In the event of an emergency shipment when time permits delivery of a container to the customer's facility, the customer again will ask Wilson to simply deliver the cargo to Wilson's port facility, stuff a container and ship it. Wilson will also stuff containers for convenience where, for instance, a customer has a shipment to be stuffed into two twenty-foot containers. Rather than delivering ten "twenty footers" to the customer's facility and transporting them to the pier, Wilson will haul the cargo in five motor carrier trailers

to its facility, stuff the ten containers and deliver them to the pier.

The work of Wilson's employees has not changed with containerization. Our employees load and unload containers using the same methods and equipment used to load and unload truck trailers. Much, if not all, of the cargo now unloaded from containers would previously have been unloaded from truck trailers.

The terminal operators could not perform the stripping and stuffing work which would be required by enforcement of the Rules on Containers. Their facilities are obsolete and have insufficient space to accommodate this amount of cargo.

Further, I sayeth not.

/s/ James R. Clark, Jr.
JAMES R. CLARK, JR.

AFFIDAVIT

COMMONWEALTH OF VIRGINIA
CITY OF CHESAPEAKE

I, John H. Everett, being first duly sworn and cautioned state the following of my own personal knowledge and belief.

I am President of Everett Express, Inc. I have held this position for thirty-four years. In my capacity as President, I oversee all sales contracts and the general operations of the company. I have exercised this authority since the company was formed in 1946.

Everett Express operates a long haul and local cartage freight transportation operation. Our facility in Chesapeake, Virginia is located at 3153 South Military Highway. The company also operates facilities at Highway 258 in North Tarboro, North Carolina and in Moorehead City, North Carolina. The company operates a fourth terminal in Richmond, Virginia. None of these four facilities serve as storage or warehouse space. The company garages its vehicles at these facilities. The company uses fork lift trucks, dollys, and pinch bars to load and unload truck trailers and containers. The company employs approximately sixty employees at its four locations. None of these employees are represented by a labor organization.

Prior to the advent of the modern container, Everett Express would pick up import break bulk cargo at the Hampton Roads Port. This cargo was destined to local consignees as well as consignees in other states. I.L.A. labor would load this cargo into the company's truck trailers at the pier. When the cargo picked up did not fill the truck trailer, it would be hauled to the company's local terminal and there consolidated with other cargo destined to consignees in the same area. Although cargo shipped from one shipper, destined to one consignee, and filling a truck trailer would be hauled from the pier to the truck terminal, this cargo would not be unloaded at the company's facilities.

Between the years 1946 and approximately 1953, the company also handled consolidated less-than-trailer loads. These loads would be returned to Everett's facility where the cargo would be offloaded from the truck trailer and reloaded into designated trailers for delivery to the ultimate consignee. The company ceased handling these consolidated loads around 1953. Since that time Everett has handled only cargo shipped by one shipper and destined to one consignee.

With respect to export cargo our company would haul its customer's goods from the customer's facility to our pier area truck terminal where the cargo would then be delivered by a local or city driver. When the customer's cargo did not fill a conventional truck trailer the company would, if possible, consolidate that cargo with other shipments originating in the customer's geographic area for delivery to our terminal.

With the advent of the modern container Everett continued to do exactly the same work as it had done prior to containerization. Containers typically do not haul cargo sufficient to fill up conventional motor carrier trailers. Thus, on the import side, Everett would not haul containers intact to the consignee's location unless instructed to do so by the consignee. The container would be picked up at the pier by a local driver and delivered to Everett's terminal. The company would there strip the container of its cargo and consolidate that cargo with other cargo destined to the same geographic area. The cargo would then be delivered by an over-the-road driver. In addition to the problem with the cargo capacity of a container, containers were stripped because often they were not compatible with our equipment. Because the container could not be properly hooked up to the cabs of our trucks, they could not safely be hauled over the road. Such haulage would also result in damage to Everett's equipment because of the incompatibility of the sea carrier's contain-

er's fifth wheel pin setting with our equipment. Often, containers would be loaded beyond the permissible limits of the state highway weight requirements. For this reason also the company would strip the containers at its pier area terminal before delivering the cargo to the consignee.

Everett will not strip a container without permission of the consignee. Because upon breaking the seal of a container the carrier is liable for deficiencies in the amount of all damage to the cargo, Everett would not break the seal on containers without the customer's authorization. If the customer did not authorize stripping, however, a different rate would be charged for delivery of the cargo. Because of the various reasons above stated for stripping containers, Everett was forced to encourage its customers to give this authorization. In 1979 Everett handled approximately 1,500 imported containers. Of these containers, approximately ten to fifteen percent were stripped at Everett's pier area facility. Those containers which were not stripped were either hauled intact according to the customer's instruction or because Everett could not arrange to deliver other cargo to the same area.

With respect to export cargo, after containerization almost all of Everett's customers stuffed their cargo into containers at their own facilities. Everett would simply haul the containers from the customer's location to its truck terminal in the port area where a city driver would be dispatched to deliver the container to the pier. The company did not stuff any of the export containers at its facility. The loading and unloading work previously performed by its employees on export cargo has been eliminated by containerization. In 1979, Everett handled between 3,500 and 4,000 export containers. It stuffed none of these at its port area facility.

Enforcement of the rules would not result in additional stripping and stuffing work for I.L.A. members. Although Everett Express could no longer strip and stuff

imported containers at its port area facility, customers would choose to pay the additional charge of having these containers hauled intact to their facilities rather than having the containers stripped at the pier by I.L.A. labor. The delays, damage, and pilferage to cargo characteristics of pier break bulk handling would result in customers instructing motor carriers to deliver containers intact. Enforcement of the rules would not affect our operation with respect to export containerized cargo. Containerization eliminated export loading and unloading work for both I.L.A. workers and our employees.

If the rules were enforced, the seaport terminals would not have the capacity to perform the stripping and stuffing work now performed by motor carriers such as Everett Express. The piers have insufficient warehousing space to accommodate the volume of cargo which would result from enforcement. The piers have simply not been and could not be developed to handle this amount of break bulk work.

Further I saith not.

/s/ John H. Everett
JOHN H. EVERETT

STATE OF NEW JERSEY)
) ss:
COUNTY OF ESSEX)

I, ROBERT W. HAGEMANN, business address, 860 North Avenue, Elizabeth, New Jersey, 07201, after first being duly sworn state the following of my own personal knowledge:

1. I am employed by Jayne's Motor Freight, Inc. (Jaynes). My position with Jayne's is Vice-President Traffic. I have worked for Jayne's since approximately November 1969, and have held my current position for about 1 year. Prior to being Vice President, I was employed by Jayne's as Traffic Manager.

2. As Vice President, I am responsible for sales and traffic. My sales duties include the solicitation of small shipments from prospective customers for consolidation into full truck and container loads. My traffic duties include rate-making, pricing and dealing with regulatory agencies. I am involved in the governing of the company and am a member of the executive committee. I am also involved directly in the day-to-day supervision of employees.

3. Jayne's has been in existence since shortly after World War II, possibly 1946. It is a New Jersey corporation and operates facilities at Elizabeth, New Jersey and Red Lion (Vincentown), New Jersey. The Elizabeth facility is located within two miles of the Port of Newark and within twelve of the Port of New York. The Red Lion facility is located outside of the Ports of New York and Newark but within 50 miles of the Port of Philadelphia. The Elizabeth operation has existed since around 1946, and has gradually enlarged. The Red Lion location has been in operation since 1970.

4. The facility at Elizabeth consists of four separate buildings, an office, a terminal, a maintenance building and a warehouse. These buildings occupy approximately six acres. The terminal is "L" shaped, with a freight

dock attached to the building. The dock floor is elevated to the height of a tractor trailer truck bed. The dock is covered, and is about 50 feet wide and about 400 feet long. It has sixty-nine, eight foot wide doors. Trailer trucks and containers are backed up to these doors for loading and unloading. We have approximately 18,000 square feet of space in the Elizabeth terminal.

5. The warehouse at Elizabeth is two buildings with one common wall. One has approximately 10,000 square feet of covered storage space. The other has approximately 3,000 square feet of covered storage space. There is a concrete apron adjoining the buildings which serves as a loading dock. Adjacent to the concrete apron is a slanted "back-in" with room for three trucks. The back-in dips so that when backed in a truck's tailgate is at the height of the apron. The concrete apron is necessary for loading and unloading steel. This work requires more support than would the loading and unloading of other types of cargo. Unlike the terminal's dock, however, it is not covered.

6. The Elizabeth office houses the dispatch operations, computer and accounting work and general administration. The Elizabeth maintenance building has room for four trailers to pull through. It has a small office and a section for parts. It houses equipment such as overhead cranes, jacks, air compressors and a forklift. Repair work on trucks and trailers is performed in this area.

7. The Red Lion facilities are smaller than those at Elizabeth. They consist of a single building with approximately 20,000 square feet of covered storage space. Attached to this warehouse area is a ramp which allows a truck trailer to actually be brought inside the building. Separated by a wall from this warehouse area is a dock area. The dock area is approximately 100 feet wide by 100 feet long. There is an elevated dock similar to that at Elizabeth which has approximately 20 doors. There is also a two bay garage for repair work, and an office in the same building. Jayne's owns 50 acres at this location.

8. Attached as Exhibit A are photographs of the Elizabeth facility. Photos A-1 and A-2 picture the warehouse. The concrete apron and back-in are illustrated. In A-1 two trucks are backed up to the apron. Photos A-3 through A-7 illustrate the terminal. The pictures show various trucks backed up to the tailgate level doors and loading dock. Photos A-8 and A-9 show the Elizabeth office. The terminal can be seen in the background of A-9.

9. Attached as Exhibit B are reproductions of photographs of the Red Lion facility. B-1 shows a front view of the Red Lion building. B-2 shows various views of the sides of the terminal and, in the photo in the upper left corner, the entrance to the maintenance area.

10. Jayne's is a short-haul, Class II cartage carrier. It is licensed by the ICC to operate in areas of Pennsylvania, Delaware, New Jersey, New York and Connecticut. The company's formal certificate of operating authority is attached as Exhibit C. As a short-haul operator prior to the advent of the modern (8′ x 8′ x 20′ or 40′) container, Jayne's made pickups and deliveries within the area of its operating authority. Customers would arrange for Jayne's to pick up cargo at their facilities and deliver it to the designated consignee. Jayne's also made pickup's and deliveries to and from the pier. At the pier, Jayne's driver would move export cargo to his truck tailgate, where a member of the ILA would move it to the pier. Conversely the Jayne's driver would move import cargo from the truck tailgate into the truck. In addition to its conventional pickup and delivery service, Jayne's has always offered a range of alternative services.

11. Since the early days of Jayne's operation, beginning more than 30 years ago, Jayne's has operated "pool truck" services. Private motor carriers leave fully loaded truck trailers at our facility for deconsolidation. On other occasions importers would arrange with Jayne's to pick up full truckloads of import cargo at the pier or receive such truckloads at its facility. Our employees would unload the truckloads and either store it for subsequent distribution or immediately deliver it to locations designated by our customer.

12. Conversely, Jayne's has also consolidated small shipments at its truck terminal for transport as full truck loads. These small shipments are picked up by Jayne's at locations designated by its customer, or would simply be delivered to Jayne's by another carrier. When a full load accumulates the cargo is delivered either by a Jayne's driver or another carrier. One example of such an operation involves a clothing manufacturer which would have Jayne's consolidate small shipments of belts, buttons, etc. into one truckload for delivery by the manufacturer to the manufacturer's facility. This consolidation work was not performed in connection with export cargo prior to the advent of the modern container.

13. The pool truck and assembling services often are performed in conjunction with one another. A manufacturer leaves a fully loaded truck trailer at the Jayne's terminal when its carrier picks up the load Jayne's has consolidated. Jayne's deconsolidates and distributes the contents of the trailer left with it and consolidates new shipments into the trailer. The trailer is then exchanged with another trailer delivered to Jayne's from the manufacturer. The process can continue indefinitely.

15. As indicated, warehousing has always been used in conjunction with the truck pool and consolidation services. Cargo often has to accumulate before being shipped as a full truckload. With the deconsolidation and distribution service, Jayne's is often instructed to distribute only part of a shipment and to store the balance of the cargo pending further instructions. However, ninety percent of the cargo brought to our facilities is distributed immediately. An extremely small percentage of our cargo is held for more than thirty days.

16. Excluding office and administrative personnel, Jayne's employs 51 employees at the Elizabeth facility and is at its Red Lion facility. These employees are rep-

resented by the International Brotherhood of Teamsters in the job classifications of dockmen and drivers. Dockmen use hand trucks, four wheeled carts and forklift trucks to load and unload cargo. Dockmen palletize cargo, as well as break apart, sort and label cargo previously palletized at manufacturers' facilities. Probably 90% of the general cargo we handle must be handled by hand during some phase of the loading and unloading process. The equipment used by Jayne's employees includes forklift trucks, hand carts and dollys.

17. The advent of containerization has not caused any basic changes in the methods we use to handle freight, in the freight-handling equipment or in the physical construction of our facilities. Our business remains basically unchanged. Jayne's still makes pickups and deliveries within the area of its operating authority. Jayne's still performs the pool truck service, deconsolidating loads for storage or immediate distribution. Jayne's also continues to haul import cargo to its terminal for storage and/or distribution. For several years some of this cargo has come to the port in containers. Jayne's hauls the containers to its terminal, where its employees unload the cargo for storage and/or distribution. Jaynes continues to consolidate domestic shipments. With containerization, however, Jayne's has also begun consolidating shipments into containers for export. Much of the export consolidation work performed by Jayne's is done in conjunction with San Juan Freight Forwarders, a non-vessel operating common carrier (NVOCC).

18. Basically, an NVOCC consolidates less-than-containerload (LCL) cargo in full containers which are subsequently tandered to vessel operating common carriers (VOCC's) for ocean transportation. In conjunction with San Juan, Jayne's provides motor transportation of goods overland from and to port areas, assembles and consolidates small shipments into larger containerloads, expedites transportation of small shipments, and furnishes tracing of shipments.

19. As required by the FMC, San Juan has filed a tariff with the FMC covering the details of service Jayne's and San Juan offer. The tariff includes various rules, regulations, and rates San Juan may charge in conjunction with the NVOCC services we offer. Our shippers/customers may be manufacturers, retailers or other businesses. Almost all of the business that Jayne's performs in conjunction with San Juan is for export. Other than perhaps recommending our services as a consolidator to some customer, steamship lines never directly contract for our services as a consolidator/shipper. With virtually no exceptions, our customers contact us directly. As an NVOCC, San Juan agrees with shippers to provide for the movement of the cargo from the shippers' facility to the designated consignee in Puerto Rico. San Juan contracts with a VOCC for the sea carriage of full consolidated containers under VOCC tariffs provisions calling for the direct movement of these containers without unloading at the pier.

20. Jayne's role in the Puerto Rican freight movement is as follows. Jayne's picks up less than full load shipments from various locations within its operating authority and transports these shipments to its Elizabeth terminal. Occasionally, small shipments are first taken to the Red Lion facility where they are consolidated into truck trailers with other cargo coming to the Elizabeth terminal, and then are transported to the Elizabeth terminal by a Jayne's driver. Jayne's employees load the export freight into containers at the Elizabeth terminal. The containers are transported to the pier. Usually a carrier other than Jayne's transports the container from the Elizabeth terminal to the pier. On occasion, however, Jayne's has performed this work. Jayne's sale force actively seeks the less-than-trailerload traffic destined for Puerto Rico. It is a profitable portion of Jayne's business and is a service not offered by many of Jayne's competitors. In addition, through our contact with the customer with respect to its less-than-trailerload Puerto Rico ship-

equipment. Therefore, if the Rules on Containers were enforced to prevent stripping of containers within 50 miles where the cargo was not warehoused for longer than 30 days, and this prevented us from stripping containers at our terminal for reloading into Overnite equipment, we would simply pick these containers up at the seaport terminals and haul them beyond the 50 miles limit to the premises of the consignee. Naturally, we would only haul such containers which would be safely hauled over the road. We would pick up and haul no 20′ containers, because they are much more unsafe due to weight and load distribution, and uneconomical due to the low volume capable of being hauled in them.

In other words, the Rules on Containers would force us to stop handling 20′ containers all together, and stop stripping 40′ containers at our Norfolk terminal. However, we would continue to haul 40′ containers at reasonable distances beyond the 50 mile limit without stripping them. Most other motor carriers would do the same. Under such circumstances, the Rules on Containers would not generate any more stripping of container work for I.L.A. labor on the piers.

The Rules on Containers would, of course, have adverse economic effect on our company, since we would be able to use less of our own equipment. In addition, this action would increase our cost of rental charges on containers. It would also cause a reduction in the number of local drivers and possibly the number of dock workers. We would also haul less total cargo, which could further reduce our work force.

Further, I saith not.

THIS 9th day of October, 1980.

/s/ D. D. Moore
DONALD D. MOORE
Terminal Manager
OVERNITE TRANSPORTATION COMPANY

AFFIDAVIT

COMMONWEALTH OF VIRGINIA

CITY OF CHESAPEAKE

I, Eric T. Nielsen, 1904 Jack Frost Road, Virginia Beach, Virginia, after having been sworn state of my own knowledge and belief the following.

I have been Terminal Manager of Thurston Motor Lines, Inc., 400 Freeman Avenue, Chesapeake, Virginia 23324, from 1963 to 19[illegible], when I went with Maislin Transport in Norfolk, Virginia for twelve years, after which I became Terminal Manager again for Thurston Motor Lines about September, 1979.

Thurston is a non-union line haul motor carrier, having operating authority in most of the Southern and East Coast states. Our Chesapeake terminal is a typical freight terminal, where we warehouse no cargo. Thurston picks up cargo from seaport terminals in the Hampton Roads Port and typically delivers it long distance from the port area. We shun short haul delivery, deliveries within one hundred miles of the port. We make no local deliveries of cargo picked up at the seaport. We handle export cargo in the same manner as import cargo.

In 1979 approximately thirty per cent of the gross volume of cargo we hauled to and from our Chesapeake terminal was in intermodal containers. During this period, we picked up from the seaport terminals approximately 1,100 containers filled with cargo from one shipper and consigned to one consignee. We stripped approximately ninety per cent of these containers in our terminal facilities. Approximately twenty to twenty-five percent were twenty-foot containers and the balance were forty-foot containers. We stripped the cargo for our own convenience. The factors we considered in determining which containers would be stripped included: containers over-

loaded beyond highway weight limits; the pulling pin that sets into the fifth wheel connection on the tractor did not match up between the container and our equipment which made it impossible to adequately turn the truck; additional freight could be consolidated in a larger road trailer for the same delivery destination; per diem costs on the container; a lack of a return load for the empty container. (This is not a problem when Thurston trailers are used since we may interchange the empty trailer for use anywhere within our system but we must return the container to the Hampton Roads Port.).

Our customer is the owner of the cargo, in most cases the consignee, but in some cases the shipper. The steamship lines are never our customers regarding container shipments. We decide, usually with our customer's prior permission, when to break open a container and strip it.

In 1979 we hauled about 125 containers to the seaport for export. We stuffed about 100 of these containers at our terminal with full container loads from one shipper. In every case, our customer instructed us to stuff this cargo into a container. We are obliged to do this, because such service is covered by our tariff rate, and thus our agreement of shipment with our customer.

I have been in the trucking business in this port since about 1956. It is my opinion that the sea terminals in this port could not collectively or individually handle all the containers required to be stripped and stuffed at the sea terminals by the I.L.A. Rules on containers. It is also my opinion that they could not strip and stuff those containers required by the rules which were stripped and stuffed by motor carriers and warehousemen within fifty miles in 1979. The sea terminals lack this capacity for the following reasons. They do not have adequate warehousing space and docks for this cargo. Furthermore, the speed with which containerized cargo moves through the sea terminals is such that to strip and stuff the containers required by the rules would completely jam up the terminals. Containerized cargo presently moves

through the seaport terminals at such a rate that stripping and stuffing the containers required by the rules would cripple the port and drive cargo away from the port.

At present, even with our company and many others stripping and stuffing substantial amounts of container cargo at our motor terminals, the seaport terminals are so congested that the Marine Terminal Association is seriously proposing to require trucking companies to schedule appointments in an effort to alleviate the congestion and properly move break bulk cargo through the sea terminals.

It usually takes over a day or two, from the time we have left a trailer at the sea terminal to be loaded with LTL cargo by I.L.A. labor, before we can haul the trailer from that terminal. It takes approximately two and one-half hours to pick up a container. It usually takes three to five days for break bulk cargo to be hauled from the sea terminal after it has been cleared by Customs for the shipment. Containers can be hauled from the seaport terminal the same day they are cleared. The break bulk delay is due to the lack of capacity at the sea terminal to move this freight any quicker.

At least twice a week during the past two or three years, the Portsmouth Marine Terminal in Norfolk has been refusing to accept any more break bulk cargo for containerization at the pier after the lunch hour, because the warehouses at the terminal are full and there is no more storage room at the terminal for any additional freight at that time. This delay means that we have to return the cargo to our facility and bring it back to the pier on another day when the seaport terminal is not too busy to handle it.

Further, I saith not.

/s/ Eric T. Nielsen
ERIC T. NIELSEN

STATE OF NEW JERSEY)
) SS:
COUNTY OF ESSEX)

I, POUL ROSANDER, after first having been sworn, state to my own personal knowledge and belief the following:

1. I am Manager of Wilson Container Co., Inc., One Exchange Place, Jersey City, New Jersey 07302, 201-432-8800. I have held this position for about four years. Wilson is a non-vessel operating common carrier (NVOCC) whose business it is to consolidate small shippers' loads from various shippers into containers for shipment across the seas, to deconsolidate containerized import cargo for distribution from our warehouse facility or storage in the warehouse, which is located on 12th Street in Jersey City, New Jersey, within 50 miles of the Port Of New York. By consolidating small shippers' loads into full container loads which we ship under our own name as an NVOCC, we are able to afford these small shippers of less than container load cargo a cheaper rate than they would obtain if they shipped the cargo themselves. We consolidate and deconsolidate cargo into and from containers at our Jersey City warehouse facility. These containers are hauled from our warehouse to Port Elizabeth, New Jersey, approximately 15 miles from the warehouse, or to Howland Hook pier facility, approximately 25 miles from the warehouse, and from these piers to our warehouse by independent contractor motor carriers.

2. Wilson Container Co., Inc., is a subsidiary of The Wilson Group, USA, Inc., which also provides customhouse broker facilities for import freight and serve as a freight forwarder for export freight. Our customshouse brokers and freight forwarders arrange for the delivery of export cargo to our Jersey City warehouse for consolidation by us and delivery to the pier, and arrange for the inland delivery or distribution of import cargo which

is hauled from the pier to our warehouse for deconsolidation. Alternatively, some of our customers make their own arrangements for the delivery of their freight to and from our warehouse by motor carriers. The Wilson Co., Inc., itself does not employ any truck drivers or provide any motor carrier services.

3. We employ four non-union employees at our Jersey City warehouse solely for the purpose of stuffing and stripping containers. These employees used forklifts, handtrucks, and similar equipment to load and unload these containers, the same equipment that they have always used for these tasks. Our warehouse facility consists of approximately 40,000 square feet at a single location. Our offices are located in an office building at One Exchange Place in Jersey City, away from our warehouse. Our warehouse is a bonded customs warehouse. This means that sealed import containers are hauled intact from the pier and unsealed at our warehouse under the supervision of United States Customs Officials, rather than being unsealed at the pier. We also seal export containers at our warehouse for delivery to the pier and shipment intact, without being opened and resealed on the pier. This service is attractive to our customers because it reduces pilferage and damage to cargo by eliminating cargo handling on the pier, in addition to the cost savings to small shippers by using our NVOCC full container load rate. Our warehouse also serves as a distribution facility for imported goods. In connection with this service, we arrange for motor carriers to haul full container loads of imported cargo to our warehouse, where our employees strip the containers and prepare the paper work necessary for other motor carriers to distribute this cargo to our customers from our warehouse. All of the services which I have described have been made possible by containerization, and the development of our business was primarily the result of the introduction of containerization into the Port Of New York. The success of our business and our profit depends directly upon our utiliza-

tion of containers. By maintaining our own warehouse facility and using our own trained employees to stuff and strip containers and handle our customers' cargo, we are able to maintain better control over that cargo and provide maximum care in its handling and storage, which is a primary feature of the service which we offer. For example, one of our customers is a large importer of paper rolls from Sweden. These paper rolls are extremely susceptible to damage from weather and mishandling, and our warehouse employees have been specially trained by our customer's own representatives in the United States in handling these paper rolls in our Jersey City facility. Moreover, there are no suitable warehouse facilities on the piers in the Port Of New York for storing these rolls of paper if they were decontainerized on the piers. In consequence, this customer utilizes our off-pier deconsolidation and warehousing services because this enables him to avoid unnecessary damage to the paper by untrained ILA labor on the pier and avoid double handling of the cargo since the paper rolls have to be delivered by truck to an off-pier warehouse for storage in any case. Our business has grown over the last few years because of the variety of services described above which we are able to offer our customers, beyond simply loading and unloading containers.

4. Services comparable to those which we offer at our off-pier Jersey City warehouse could not be offered at the piers in the Port Of New York. For example, we have a contract with a group of magazine and paperback book importers in Scandinavia. We receive American magazines and paperback books at our warehouse, where we sort them by hand according to their destinations, palletize them, and shrink-wrap these palletized loads before stuffing them into containers for delivery to the pier. The pier facilities do not have the capability to sort these goods by hand and shrink-wrap them after they have been palletized. The pilferage of these goods if they were handled on the pier would also increase dramatically. The same considerations apply to other perishable and easily pilfered goods which we handle through our warehouse.

5. As an NVOCC, we are regulated by the Federal Maritime Commission. By virtue of regulations promulgated by that agency, we ship full container loads of consolidated cargo under our own names as the shipper, vis-a-vis the vessel operating common carrier (VOCC), with whom we contract for the sea carriage of our containerized cargo. As the shipper, we select the VOCC which will carry our containers and we select all of the services which that VOCC will provide, based upon the tariff filed by the VOCC with the Federal Maritime Commission, at the rates provided in that tariff. All of the services which we select are included in the Ocean Bill Of Lading which covers the sea movement of our containerized cargo by the VOCC. This Ocean Bill Of Lading is our contract with the VOCC. No services can be imposed upon us by the VOCC which are not specified in the Bill Of Lading, and no charges may be imposed upon us which are not provided in the Bill Of Lading. Thus, unless we request and pay for stuffing or stripping on the pier, and specify that labor service in the Ocean Bill Of Lading, on-pier stuffing and stripping of our containers cannot be imposed upon us by a VOCC without violating the Ocean Bill Of Lading, and we could not be required to pay for these unwanted services. Similarly, fines assessed under the ILA's Rules on Containers cannot be passed on to us by a VOCC consistent with the terms of our Ocean Bill Of Lading which does not provide for our payment of those fines. We have never entered into an Ocean Bill Of Lading which required us to reimburse a VOCC for fines levied under the Rules On Containers. As the shipper of these containers, we retain complete control over our cargo by virtue of the contract terms of the Ocean Bill Of Lading. VOCCs have no right to control what we do with containers and cargo at our warehouse, and have no right to impose unwanted labor services on us at the

pier since that extra stuffing and stripping work has not been specified in an Ocean Bill Of Lading.

6. Effective Friday, January 2, 1981, all VOCC with which we deal began enforcing the ILA's Rules On Containers in the Port of New York. Since that time, Atlantic Container Line has held up four of our import containers on the pier and refuses to release them to us unless they are stripped on the pier by ILA labor, under the Rules On Containers. We have refused to allow Atlantic Container Line to strip these containers on the pier because to do so would violate our customers' specific instructions to strip their cargo from the containers at our own warehouse using our own bonded employees. We cannot allow Atlantic Container Line to strip these containers on the pier without violating our contracts with our customers and severely damaging our business relations with them. I have contacted many other NVOCCs operating in the Port Of New York, and have learned that all VOCCs are similarly refusing to release import containers to them unless these containers are strip on the pier by ILA labor. Atlantic Container Line has also interdicted refrigerated containers of perishable foodstuffs at the pier even though these containers were moving "house to house," that is, from the point of shipment to a public warehouse off the pier, pursuant to Ocean Bills Of Lading. Because these foodstuffs will not be warehoused in the public warehouses for a minimum of 30 days, Atlantic Container Line and other VOCCs have refused to treat these containers as "house to house" containers, despite the terms of Ocean Bills of Lading which were issued for house to house movements, and will not allow these containers to reach the pier unless the importer agrees to warehouse the cargo for a minimum of 30 days, under the Rules On Containers. To the best of my knowledge, there are not sufficient refrigerated warehouse facilities available on the piers in the Port Of New York to allow the VOCCs to strip all perishable foodstuffs from containers and store them temporarily

on the pier awaiting pickup by motor carriers for delivery inland, as the Rules On Containers would require. Non-the-less, the VOCCs are refusing to release these containers of perishable goods for stripping off-pier and immediate delivery of the cargo. Atlantic Container Line has also told us that it will not allow our Swedish customer's rolls of paper off the pier unless the customer agrees to warehouse it in our facility for a minimum of 30 days which is causing him tremendous economic hardship because all of this paper is already sold and is due for immediate delivery to customers in the United States. Our Swedish customer cannot continue to operate under these conditions, and if they continue, he may abandon our services in preference to a warehouse facility more than 50 miles away from the pier, in order to avoid the 30 day warehousing requirements of the Rules On Containers. The VOCCs are also refusing to accept any export containers from us which we consolidated at our Jersey City warehouse, unless we agree to have them stripped and restuffed at the pier under the Rules On Containers. I have contacted many other NVOCCs in the Port Of New York, and have learned that the VOCCs are universally refusing to accept any full container loads of export cargo which was containerized within 50 miles of the pier. The enforcement of the Rules On Containers since January 1, 1981 has brought our container services virtually to a stand still, since the VOCCs will not release containers to us or accept loaded containers from us. If this continues, we will lose business which will move to warehouses beyond 50 miles from the pier or to Canadian ports, and we will probably never be able to get that business back. This loss of business is irrevocable, and will irreparably damage are NVOCC services to the loss of valued customers and businesses in a way for which money damages can not compensate us. Our company can not continue to do business without containers being supplied by the VOCCs, from whom we obtain all of our containers at this time.

7. Hapag Lloyd, a VOCC, which is a member of the New York Shipping Association, has also refused to give us containers or accept containers we send to the piers. C.J. La Penna, Vice President of Hapag Lloyd North Atlantic Service, told me on the telephone on Tuesday, December 30, 1980, his company would no longer be willing to accept containers loaded with cargo off the pier by our employees, even if their FAX tariff rate remained, in effect, because the ILA was objecting to our loading and unloading of containers within 50 miles. He also told me that Hapag would not furnish any more empty containers to our company. Hapag instructed our company on January 2, 1981, to return to the dock an empty container we already had at our facility.

8. In addition, on Tuesday, January 20, 1981, Wilson Container attempted to book two forty foot containers on an Atlantic Container Line sailing. These containers were leased by Wilson from a leasing company, not a VOCC, in Gothenburg. Although Wilson Container informed ACL of our leasing arrangement, Dan Carrigan, an official at ACL, told us the containers would not be handled unless we leased them under a three month agreement and filed the lease agreement with the ILA.

/s/ Poul Rossander
POUL ROSSANDER

AFFIDAVIT

COMMONWEALTH OF VIRGINIA

CITY OF CHESAPEAKE

I, Douglas P. Russell, being first duly sworn and cautioned state the following of my own personal knowledge and belief.

I am employed as Terminal Manager of McLean Trucking Company's Norfolk, Virginia area terminal located at 1310 Cavalier Boulevard, Chesapeake, Virginia 23323. I have been employed in this capacity for one year, prior to which time I was employed by McLean as its Terminal Manager in Albany, Georgia and before that as Assistant Terminal Manager in Winston-Salem, North Carolina. I have been employed by McLean since 1976.

As Terminal Manager of McLean's Norfolk terminal, I am responsible for McLean's local terminal operations. The Norfolk area serves Lambert's Point Dock, Norfolk International Terminal, Sewell's Point Dock and Portsmouth Marine Terminal. Until 1979, we also served the Newport News Terminal from our Norfolk facility.

McLean is an I.C.C.-regulated motor common carrier engaged solely in the interstate transportation of general commodity freight by motor truck throughout the United States. All of McLean's non-clerical, hourly-rated employees at its Norfolk terminal are represented for purposes of collective bargaining by Local No. 822 of the International Brotherhood of Teamsters Union.

McLean does not deliver or pick up any freight for delivery in the local Norfolk area from its Norfolk terminal, or elsewhere in Virginia. All of the freight which McLean picks up at the seaport terminals it services from its Norfolk facility is hauled to consignees outside of Virginia, and all of the freight which McLean receives at its Norfolk terminal for export comes from shippers outside

or Virginia. Approximately seventy percent of the freight which McLean handles through its Norfolk terminal is import cargo and the remaining thirty percent of the freight is export cargo.

McLean does not handle any less-than-container load (LCL) or less-than-trailer load (LTL) containerized freight at its Norfolk terminal. All of the containerized freight which McLean handles through its Norfolk terminal is full shipper's load (FSL) cargo from a single shipper destined for a single consignee. McLean does not consolidate or deconsolidate any LCL or LTL freight into or from containers at its Norfolk terminal, nor does it transport any LCL or LTL freight in containers. Any LCL or LTL freight which McLean handles through its Norfolk terminal is non-containerized, break bulk cargo which is containerized or decontainerized at the seaport terminal by I.L.A. labor.

McLean does not warehouse any freight at its Norfolk terminal or use its Norfolk terminal as a distribution facility for its customer's freight. McLean's Norfolk terminal is a traditional freight terminal where McLean transfers cargo between its over-the-road tractor trailers, and containers and its local delivery trucks. McLean hauls containers, whether empty or full, only between its Norfolk terminal and the seaport terminal. All deliveries between McLean's Norfolk terminal and the seaport terminal are made by container or by a local delivery truck, in the case of LCL or LTL break bulk cargo. McLean strips all FSL import containers at its Norfolk terminal and reloads the cargo into its own over-the-road trailers at the terminal. McLean stuffs all FSL cargo which arrives at its Norfolk terminal for export into containers at its terminal and then hauls these loaded containers to the seaport terminal as FSL containerloads. All stuffing and stripping of containers, loading and unloading of over-the-road trailers and local delivery trucks, and all other cargo handled by McLean's Norfolk terminal is done by McLean's teamster-represented employees.

Prior to 1975, McLean hauled some containers in interstate commerce. However, we found that our tractors were damaged by the containers when we did this because the containers do not hook up properly to our tractors. Accordingly, in 1975, we stopped hauling any containers over long distances and commenced our present practice of hauling containers only between our freight terminal and the seaport terminals, and stuffing and stripping all containers at our terminal. In 1979, we hauled niney-five import containers and forty export containers between our terminal and seaport terminals, all of which we stuffed or stripped at our terminal. The number of containers we handled has decreased since 1975 because we haul them only between our facility and the seaport terminals. A chart showing the history of McLean's handling of containerized cargo at its Norfolk terminal, which I prepared from our business records, is attached hereto as Exhiibt A.

McLean uses fork lifts, pallet jacks, hand trucks, and hand labor to load and unload containers in the same way that it has always loaded and unloaded truck trailers. Modern containerization has not changed McLean's methods of work or labor requirements, and McLean handles all cargo, whether containerized or break bulk, in the same way.

McLean hauls containers only between the seaport terminal and its Norfolk facility and consolidates and deconsolidates all containerized freight to and from its over-the-road trailers at its facility, rather than haul containers interstate, for the following reasons:

1. McLean's tractors are incompatible with the chassis of containers because the fifth wheel on the tractor is not designed to accommodate the container hook-up; hauling containers with McLean's tractors for a distance in excess of approximately twenty-five miles will damage the tractor;

2. The per diem charge of \$10.00 to \$12.00 imposed on McLean for the use of a container under

an equipment interchange agreement makes it diseconomic for McLean to use containers rather than its own over-the-road trailers to haul freight to and from points inland;

3. Neither the standard twenty-foot nor the standard forty-foot container holds as much cargo as McLean's forty-five-foot long, thirteen and one-half foot high over-the-road trailer, making it more economical for McLean to haul freight in its own trailers;

4. Since McLean's equipment interchange agreement requires it to return all containers to their points of origin, McLean would have to haul empty containers back to their points of origin if it used them for long-haul carriage inland, whereas McLean can reroute its own tractor trailers as needed elsewhere in the United States to avoid the expense of an empty return trip to the port or the point of origin;

5. McLean also avoids hauling freight over the road in containers to minimize container maintenance costs under the equipment interchange agreement;

6. Since many import containers which McLean picks up at the sea terminal are loaded too heavily for safe and legal long-haul highway carriage and may not have proper weight distribution for highway carriage, McLean must reload the freight from these containers into its own trailers to comply with federal, state, and local highway laws, regulations and ordinances and for reasons of safety;

7. Under McLean's collective bargaining agreement with the Teamsters Union, only local drivers haul freight between McLean's Norfolk terminal and the seaport terminals and only over-the-road drivers drive McLean's long-haul tractor trailers in interstate commerce. Since all cargo is picked up or delivered to the sea terminals by our local drivers, it must be transferred to and from over-the-road tractor trailers driven by our long-haul drivers at the Norfolk terminal.

All of the containers which McLean stuffs and strips at its Norfolk terminal are stuffed and stripped only for these reasons, relating solely to McLean's operations as an interstate motor carrier. In no case has McLean ever stuffed or stripped a container at its Norfolk terminal to avoid I.L.A. on-pier labor or costs relating to I.L.A. labor.

The I.L.A. may not prohibit McLean from stuffing or stripping a container or dictate McLean's use of a container which is obtained under an equipment interchange agreement. The equipment interchange agreement is a contract between McLean and the company that owns the container, and provides for McLean's exclusive use and control of the container, for which McLean pays a per diem fee to the container owner.

Since McLean's Norfolk terminal is located within fifty miles of the seaport terminals we serve, McLean will be denied access to containers or will be forced to pay fines by the sea carriers if McLean continues to stuff and strip containers at its Norfolk terminal, in the event that the I.L.A. rules on containers are enforced, even though McLean stuffs and strips only FSL container loads for reasons unrelated to I.L.A. labor or I.L.A. labor costs. Enforcement of the I.L.A. rules on containers will force McLean to cease hauling containerized freight through its Norfolk terminal, since it would not be economical to do so under the rules. In my opinion, the seaport terminals we serve are incapable of accommodating the stuffing and stripping of all containers on the pier and the I.L.A. could not handle the stuffing and stripping of all containers at the pier. Among other things, since it takes only four hours to interchange a container, but it takes as long as a day to pick up break bulk cargo on the pier, the consolidation and deconsolidation of all containerized cargo on the pier will cause such delay in cargo processing that our customers will transfer their

business to other ports. Thus, in my opinion, enforcement of the I.L.A.'s rules on containers will not result in more work for I.L.A. on-pier labor, but will only drive business away from the Hampton Roads port.

Further, I saith not.

/s/ Douglas P. Russell
DOUGLAS P. RUSSELL

AFFIDAVIT

COMMONWEALTH OF VIRGINIA

CITY OF NORFOLK

I, Daniel M. Thornton, Jr., business address 3616 Virginia Beach Boulevard, Norfolk, Virginia 23502, after first being sworn state of my own personal knowledge and belief the following.

I am President of Southgate Corporation doing business as Southgate Trucking and Southgate Terminal Warehouse Company. Both of these divisions of our company operate at a warehouse and truck dock establishment located at 3700 Village Avenue, Norfolk, Virginia 23502. This facility is within 50 miles of the port of Hampton Roads, Virginia. A copy of a brochure describing our current services is attached herewith as Appendix A. A copy of our brochure describing our services in approximately 1965 is attached herewith as Appendix B. A copy of a brochure describing our corporate services in approximately 1930 is attached herewith as Appendix C. At that time our warehouse operation was located on a sea pier. Our three main warehouse buildings and the sea pier are shown on the picture on page 2 of Appendix C. At that time, ships were unloaded at our pier by I.L.A. longshore labor. Our non-union employees moved the break-bulk cargo across the pier into our warehouses for storage, deconsolidation, repacking and ultimately rehauling to the consignee. On page 7 of the brochure is listed thirteen services we offered to our customers.

Our company was formed in 1892 and has been in continuous operation since then. In approximately 1930 our company formed a separate division to operate the business of general warehousing. For many years we operated this service within our seaport terminal facilities. From the beginning we have been the largest warehous-

ing and distribution facility in the port area for foodstuffs. Our customers have historically used us as a distribution center so that they would not have to build additional warehousing facilities of their own.

For many years we have operated a local cartage trucking business, making pick ups and deliveries in the local area.

Since 1892 our company offered freight consolidation services to shippers. We accumulate cargo from various shippers in our warehouse for shipment in large amounts to west coast ports. Such consolidation offers cheaper transportation rates to our small shippers. Prior to containerization, all of this consolidated freight was in break-bulk form. After the modern container was developed, our consolidated freight was stuffed into containers for shipment. Likewise, throughout the history of our company we have received large shipments of imported goods and deconsolidated them at our warehouse for distribution to many small consignees. Until the modern container was used we received this import freight in break-bulk form. After containerization, we deconsolidated the cargo from the container in the same manner as we used to with respect to break-bulk cargo.

The first container ship brought imported cargo to the Hampton Roads Port in 1967. The vessel "Tennier," owned by the Belgian Lines, the predecessor of Dart Container Lines, was a converted break-bulk vessel which brought the first containers. The day it docked, I, as a member of the City Council of Norfolk, attended a luncheon on the ship to celebrate the introduction of the new service to the port. From that time until 1969 to 1970, our company handled any and all containers in any manner we saw fit without objection from the steamship lines or the I.L.A.

The introduction of the container did not materially affect the physical operation of our consolidation and deconsolidation services. Our warehouse employees loaded and unloaded cargo from and to the container in the same

manner they had done so when it was break-bulk cargo being hauled in a tractor trailer truck. We used the same equipment, such as power driven fork lift trucks, hand carts, and dollys. Even today, we could consolidate and deconsolidate break-bulk cargo for our customers in our warehouse and transport it to and from the piers in break-bulk form, without any significant changes in our methods of operation. However, the enforcement of the I.L.A.'s rules on containers, beginning about 1969 or 1970, had a drastic adverse impact on our consolidation and deconsolidation and warehouse business.

Before, when a container filled with cargo arrived at a port terminal consigned to us as agent for the ultimate consignee, our customer, one of the trucks picked it up and pulled it to our warehouse. If the container held a full load of the same cargo going to the same customer, we would haul it to our yard until it could be delivered by us or some other motor carrier. However, if our customer wished to store that cargo in our warehouse, we would strip the container and store the cargo until our customer directed that some or all of the products be forwarded to a designated location. These distributions would be made both within and outside a 50-mile line around the port. We might store these goods from one day to one year or more. Our historical pattern has been that a majority of our warehoused goods were shipped out within 30-45 days of receipt. The introduction of containerization did not change our pattern of warehousing or reshipping during the years 1967-1969. This pattern was and is dictated by sales of our customers and their orders for our distribution.

Between 1967 and 1969 when we were handling container traffic without I.L.A. interference, the volume of cargo we shipped and received did not vary from our historical pattern. In other words, no customers were using our warehousing facilities as merely consolidation and deconsolidation stations to avoid paying I.L.A. labor rates.

Enforcement of the rules on containers adversely affected us, beginning in the early 1970s, in this way. The I.L.A. would instruct the steamship lines not to release containers we had been ordered by our customers to pick up at the seaport terminals. The I.L.A. felt that stripping and stuffing of containers at our warehouse violated the rules. These containers were then stripped by the I.L.A. at the piers. We picked up this formerly containerized cargo in break-bulk form at the pier and brought it to our warehouse where it was treated in our normal fashion. Because the I.L.A. stripped the containers, the terminal company charged our customers extra fees, to cover the cost of I.L.A. stripping. These extra fees had not been part of the original shipping agreement between the shipper and the consignee, who had agreed to transport the cargo in containers at container rates, with the understanding that these containers would be stripped by us.

Historically in the Port of Hampton Roads, prior to this year I.L.A. labor working at the seaport terminal loaded break-bulk cargo in our trucks without the assistance of our employees. Therefore, the introduction of containerization saved our company no additional loading and unloading costs for movement of cargo from the seaport terminal into our warehouse. Both before and after containerization, our driver simply pulled a loaded trailer from the terminal to our warehouse, where our warehousemen unloaded the container or trailer.

The effect of containerization was to save our customers the cost of paying I.L.A. labor to handle the cargo in break-bulk form on the pier. When the rules on containers were enforced, our customers, who expected container cargo to be delivered to our warehouse without the expense of I.L.A. stripping and reloading into our trucks, were required to pay for this unwanted service.

This had the effect of causing our customers to cease using us as a port area agent and distribution center. To avoid these I.L.A. extra expenses, many of our customers of long standing simply had other trucking companies haul containers, both full shipper's loads and less than container loads, to someone else's warehouse and distribution center beyond the 50-mile limit. Attached hereto as Appendix D is a list of some of the import and export commodities we lost, from customers of long standing, as a result of this effect of the rules. Therefore, the rules on containers, when enforced, did not have the effect of providing additional stripping and stuffing work to the I.L.A. at the seaport terminals. It only had the effect of forcing business away from us and beyond the 50-mile limit.

In every case, where we handled cargo in break-bulk or containerized form, our customer, whether he be an importer or exporter, always specifies what services we are to perform on his behalf. Our customer instructs us to strip or stuff containers or deliver them unopened to some other location.

When a customs house broker or a freight forwarder directs us to pick up a container from the seaport terminal, it issues a "delivery order." The name of the ultimate consignee, the identification of our company as the consignee's agent, the identification of the type of container and cargo contained therein, the type of movement (house-to-house, pier-to-pier, house-to-pier, pier-to-house, etc.), and any other special conditions pertaining to the container such as inspection of the cargo by various Government agencies. A copy of a typical delivery order is attached herewith as Appendix E. We have never received or used a delivery order that in any way indicated how long the cargo would be warehoused by us.

Our warehouse is a bonded U.S. Customs Department warehouse. This means that containers can be brought to our warehouse and remain sealed here until a Customs inspector arrives to break the seal, inspect them, and permit us to remove the contents. Approximately 10-15% of the total containers stripped at our warehouse are inspected at our warehouse by Customs upon the direction of the shipper or his agent. Such a container cannot be

opened, whether for inspection purposes or stripped at the pier, without violating those instructions.

Many customers of ours want their containers inspected by Customs at our warehouse because it avoids the delay of inspection at the seaport terminal. Delays are caused when cargo is inspected at the pier by Customs; it is required to be placed in a U.S. Customs bonded area on the sea terminal until the duty is paid. It usually takes much longer to clear the port and to be forwarded on to the ultimate consignee then when this inspection is performed at our warehouse. Therefore, we are able to offer a faster warehousing and transportation service on this type of containerized cargo than the terminals.

For similar reasons cigarettes and other cargo which are being exported are processed through our warehouse under the control of the Alcohol, Tobacco and Firearms Division of the U.S. Internal Revenue Service.

Attached here to as Appendix F is a chart showing the volume of cargo and numbers of containers we have handled with respect to our warehousing operations in selected years.

Further, I saith not.

/s/ Daniel M. Thornton, Jr.
DANIEL M. THORNTON, JR.

AFFIDAVIT

STATE OF VIRGINIA,

CITY OF NORFOLK, to-wit:

I, Martin E. Day, reside at 1136 Cresthaven Lane, Virginia Beach, Virginia 23462, and, after first being duly sworn, state on my own personal knowledge and belief the following:

I am a licensed Customhouse broker and a licensed foreign freight forwarder, doing business in the Port of Hampton Roads, Virginia. I have been in business for myself for the past 11 years. Prior to that time, I performed the same work for Wilfred Schade & Co., Inc. for five years and for Cavalier Shipping Company, Inc. I am quite familiar with all the duties and responsibilities required of Customhouse brokers and foreign freight forwarders, and the functional integration of our services with those of shippers, consignees, terminal companies, steamship line companies, railroad companies and motor carriers. I work with all of the major carriers and related service companies in the Port of Hampton Roads.

A Customhouse broker is an agent of an importer of cargo. The importer contracts with the Customhouse broker to clear the import cargo with the United States Department of Customs and other governmental agencies which regulate import cargo and movement. All import cargo must be inspected for compliance with Customs and other laws by Customs inspectors before it can be finally released for further land shipment. Imported shipments remain under surety bond coverage, issued by the ocean vessel operating company, until Customs inspects the cargo and it is released from bonded shipment. The purpose of the bond is to insure that the Customs laws and regulations are complied with.

Most cargo is inspected at the seaport terminal and released by Customs for further transport. As soon as

cargo is cleared by Customs, the import duty must be paid on it by the importer. Frequently an importer will want to delay payment of this duty. He can do so by permitting the cargo to remain under bond and not having it cleared by Customs. Seaport terminals maintain bond warehouses for this purpose. Bonded cargo is locked in a secured warehouse area. Customs inspectors supervise placing of the cargo in the bonded warehouse and the removal of it. Only they have keys to the bonded warehouse.

Customshouse brokers prepare, on behalf of the importer, the documents necessary to clear the cargo through Customs, including calculating the duty owed. This document is filed with Customs. This document is generally called a "Customs Entry" Form. I also am responsible for resolving any disputes arising with Customs over the cargo.

I perform similar services for the importer in clearing the cargo through the regulatory inspection and procedures of the United States Department of Agriculture, Food and Drug, and others, and the Stae's authorities such as The Alcoholic Beverage Control Board.

Approximately 15% of the imported cargo is not cleared by Customs at the seaport terminal. The importer may direct bonded cargo to be delivered to a bonded warehouse off the sea terminal premises but in the general vicinity of the port area or hundreds of miles away. Warehouses that offer bonded warehouse services must be licensed by Customs and operated in the same manner as sea terminal bonded warehouses. The ocean vessel operator's bond of the cargo does not extend beyond the sea terminal. Cargo bonded beyond that point in another warehouse must be bonded by the importer. During transportation between the seaport and the bonded warehouse the carrier bonds the cargo. Along with the surety bond, those responsible for bonding must keep documents showing close control and accountability of the cargo, which is filed with Customs. Bonded warehouses are only permitted in areas where there is sufficient volume and convenience for Customs to inspect cargo.

If cargo is to be moved from the sea terminal to a bonded warehouse, the Customshouse broker is still required to file with Customs an "In Transit Entry" form which simply records the transaction.

The documents and procedures followed are the same whether or not the cargo is being transported as breakbulk or in inter-model containers.

In addition to handling the regulatory matters, a Customshouse broker must act as the importer's agent with respect to handling his accounts with the ocean vessel operator and the terminal company. Typically, the shipper or his agent prepares a bill of lading covering the sea movement or cargo. When a cargo is delivered to the ocean vessel carrier, it signs the cargo on board its ship, by dating the bill of lading, verifying the number and kind of cargo received and numbering the bill of lading. This bill of lading, executed between the shipper and the ocean vessel carrier, becomes a contract of carriage. The ocean vessel operator is responsible to transport the cargo, without loss or damage, and deliver it to the importer or his agent. The carrier never takes title to the cargo. Most cargo shipped across the ocean is covered by a negotiable bill of lading. The original bill constitutes legal title to the cargo, which may be traded as commercial paper or negotiated for credit. By this document the shipper transfers title of the goods to the importer. After the cargo is signed on ship, the ocean carrier is given a copy of the bill of lading for record purposes. The original bill of lading is sent back to the shipper. The shipper typically turns the original bill of lading and other related documents over to his bank, which sometimes credits him with the value of the bill. The bank then forwards the documents to the importer's bank for completion of the transaction with the importer. The more usual banking transaction is that the shipper's bank

transfers the paper to the importer's bank for collection, and the shipper is only given credit after the collection is made. Once the importer pays the bank the value of the bill of lading, he takes title to the cargo.

The terms of transportation are negotiated between shipper and importer at the time of the initial sale transaction. There are many ways of allocating shipping costs between the two parties. The three most common methods of transportation costs division are F.O.B., C.I.F. and C. & F. F.O.B. (free on board) requires the importer to pay all transportation costs, including insurance, after delivery to the export sea terminal. C.I.F. (cost, insurance and freight) requires the shipper to pay the insurance and the ocean freight costs. C. & F. (cost and freight) requires the shipper to pay the freight and the importer to pay the insurance. The party who pays the cost of such carriage is entitled to choose the carrier and the method of transportation.

Therefore, either the shipper or the importer contracts with the ocean vessel operator to move the cargo pursuant to the agreement of carriage entered into before the carriage is made. This agreement is based on the terms and conditions of tariffs filed by the ocean carrier. These terms and conditions are very specific and the tariff rate is fixed. They are not subject to change during the carriage because of any intervening factor, including collective bargaining agreements such as the ILA Rules on Containers. Once an ocean carrier accepts shipment pursuant to a particular tariff, he is responsible for the services required therein to be paid for at the tariff rate. If the parties have agreed that a container of cargo will be carried without stripping or stuffing at the sea terminal by ILA labor, no additional charges can be levied by the ocean carrier against the other party for this service.

I have never seen a bill of lading agreement between a shipper or importer and an ocean carrier which provides for stripping and restuffing of a container already stuffed with cargo by someone acting on behalf of the shipper

before the container reaches the sea terminal, or stripping or restuffiing a container at the import sea terminal which is destined for container movement beyond. The only bill of lading agreements I have ever seen required ILA labor to strip or stuff containers at the sea port terminals which had not already been done away from the sea terminal. Thus, it would be a breach of the shipping agreement for the sea carrier or the terminal company to cause a full container brought to the sea terminal to be broken open and the cargo rehandled by ILA labor before ocean movement.

Many shippers and importers want their cargo to be packed in containers in special ways for its protection from damage or loss by pilferage, use of cheaper or more effective packing materials, cheaper labor packing costs, cheaper ocean tariff costs, and sometimes more efficient packing which permits a greater volume of cargo to be shipped in a single container than can be packed in it at the sea port terminals by ILA labor.

Such vessel operators do not, in most cases, own or operate sea terminals. An exception in the Port of Hampton Roads is the Sea-Land Container Terminal, owned and operated by Sea-Land Services, Inc. for its exclusive use, which is a vessel owning and operating company. The capital improvements and the land at the other sea terminals in the Hampton Roads Port are owned by the Virginia Port Authority, a State agency. Some of the terminal companies, such as Portsmouth Marine Terminals, Lambert's Point Terminal, and Seawell's Point Terminal, are leased by the Virginia Port Authority to privately owned terminal companies. The Norfolk International Terminal, the largest sea terminal in the port, is a nonprofit corporation owned by five stevedoring companies. Stevedoring companies are in the business of loading and unloading ships calling at the sea terminal. Stevedoring companies employ ILA labor to do this work. Stevedoring companies do not own or operate ocean ves-

sels. Shippers and importers never enter into any agreements with stevedoring companies.

Stevedoring companies provide labor for unloading and loading vessels according to contract between vessel operators and stevedoring companies. These are called longshoremen. Terminal companies enter into contracts with the stevedoring companies for the provision of ILA labor, called shortshoremen to handle the cargo in the warehouses and between the dock and the rail car or the motor truck.

Stevedoring companies negotiate different contracts with shortshoremen and longshoremen. There are different bargaining unit descriptions of the type of work covered. Shortshoremen and longshoremen belong to different locals of the ILA.

It is my understanding that the ILA's Rules on Containers were negotiated to preserve work for longshoremen, not for shortshoremen. It is my understanding that all stripping and stuffing of containers at sea terminals is performed by longshoremen and not by shortshoremen.

The only charges a shipper or importer would normally pay for services rendered at sea terminals, other than the tariff rate paid for ocean movement, would be for costs incurred by terminal companies for loading or unloading break-bulk cargo on to or from motor or rail carriers' vehicles. Naturally, no agreement is made between the shipper or importer to pay these terminal charges when the agreement for such carriage provides for full container movement from points beyond the export terminal to points beyond the import terminal.

When the ocean carrier offers a tariff agreement of carriage for container transportation services of the type whereby cargo is loaded and unloaded in and from the container by other than ILA labor at the sea terminal, it is bound by that agreement to carry the containerized cargo and deliver it without additional labor services being performed at the sea terminal, regardless of who strips or stuffs the container away from the sea terminal.

The Customshouse broker also arranges for inland transportation of import cargo. Sometimes an importer specifies the type of inland carriage and/or the specific carrier. Usually these selections are left to me. I will arrange and direct long haul motor carrier services to a point specified by my client. Sometimes, my client directs that the authorized cargo be delivered to a local warehouse for stripping, for further immediate movement inland, or storage until inland movement is directed.

As a foreign freight forwarder, I perform for exporters services similar to those I perform for importers. Normally, the shipper arranges for land transportation of cargo to a warehouse in the local area or the sea terminal. Normally, I arrange on his behalf for the sea carriage, including the selection of the carrier. I also advise the shipper on different types of tariffs and transport arrangements. On every occasion my client instructs me on the type of service he wants, and I merely make the arrangements on his behalf. Although I prepare the shipper's bills of lading, I never issue them in my own name either as a shipper or a carrier. Customhouse brokers and foreign freight forwarders are merely agents of principals.

Nonvessel operating common carriers (NVOCC's) perform many of the services I perform. However, they also issue bills of lading in their own names and contract for carriage in their own names cargo they have received and consolidated for shipment from small shippers. Thus, NVOCC's become the shipper and the importer with regard to all modes of transportation between the point of consolidation at the NVOCC's warehouse and the point of deconsolidation at his warehouse on the import side.

Importers and exporters pay for my services directly. Also, in addition, I am paid a brokerage fee by ocean vessel shippers for booking cargo passage on their ships.

Further I saith not.

/s/ Martin E. Day

AFFIDAVIT OF JOHN M. HAYNES

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

JOHN M. HAYNES, being duly sworn deposes and says:

I am the Executive Vice President of Respondent, New York Shipping Association, Inc. ("NYSA"). I submit the following direct testimony and annexed exhibits on behalf of Respondents, NYSA.

I was first employed by NYSA in 1958 as special assistant to NYSA's Chairman. Prior to my employment with NYSA, I was employed by American President Lines, first as a seagoing officer and later as its port captain or terminal manager at its pier facility in the Port of New York. I have from time to time physically observed the operations at most of the waterfront facilities in the Port of Greater New York. My duties and functions, first as special assistant to NYSA's Chairman, then as NYSA's Administrative Director, and now as Executive Vice President, have consisted of active participation in the negotiation, administration and implementation of labor contracts entered into by NYSA with the International Longshoremen's Association, AFL-CIO ("ILA"). I am intimately and personally aware of the facts and circumstances set forth in this direct case.

I. *Interested Persons*

A. *Employer Associations*

1. Council of North Atlantic Shipping Associations ("CONASA") is an unincorporated multi-employer bargaining association, which functions as the collective bargaining representative in negotiating and administering collective bargaining agreements with the International

Longshoremen's Association, AFL-CIO ("ILA") covering terms and condtions of employment of longshore labor in the ports of Boston, New York, Providence, Philadelphia, Baltimore and Hampton Roads, on the North Atlantic coast of the United States. Its members are the various employer shipping associations operating in the six major North Atlantic ports, as follows:

The Boston Shipping Association, Inc.
Rhode Island Shipping Association, Inc.
New York Shipping Association, Inc ("NYSA")
Philadelphia Marine Trade Association
Steamship Trade Association of Baltimore, Inc. and
Hampton Roads Shipping Association

CONASA's constituent port association members, each negotiate and administer collective bargaining agreements with the ILA covering local conditions.

2. NYSA is an incorporated New York Not-for-Profit membership association which negotiates and administers collective bargaining agreements with ILA on behalf of its members. The membership of NYSA consists of stevedores, common carriers by water, carrier agents, terminal operators, lighterers, contracting guard service and other concerns functioning in waterfront related activities involving or related to the ocean shipment of cargo, freight and the transportation of passengers.

3. For many decades, bargaining on the Atlantic and Gulf coasts commenced with negotiations between the ILA and its constituent locals, and NYSA in the Port of New York. After agreement had been reached with NYSA, the ILA would bargain with other ports. In 1956, a major demand of the ILA in New York negotiations was for the extension of bargaining on a coastwide basis. After a lengthy strike that year the employer associations in the other North Atlantic ports agreed that NYSA could execute a master contract on behalf of itself and the other North Atlantic ports with respect to certain specified issues. In 1956, and in each of the suc-

ceeding collective bargaining periods, including the one ending September 30, 1971, master contracts covering the specified items were entered into by NYSA with the ILA for and on behalf of itself and the other North Atlantic employer association. Prior to negotiations of the 1971-1974 contract with the ILA the constituent member associations of CONASA entered into an arrangement to form CONASA. Thereupon, negotiations commenced between CONASA and the ILA concerning various terms and conditions that would be applicable to all North Atlantic ports. Certain other items known as local working conditions would still be negotiated locally by each of the ports with ILA. On November 16, 1971, CONASA and the ILA formalized the scope of their negotiations in a memorandum of agreement, annexed hereto as Exhibit 1, which reads in pertinent part as follows:

> "1. ILA and CONASA agree to act as the collective bargaining representatives for their constituent locals and members, as referred to above, on the seven master contract items which are as follows:
>
> A. Wages
>
> B. Hours
>
> C. Contributions to the Welfare Plans (but not the benefits)
>
> D. Contributions to the Pension Plans (but not the benefits)
>
> E. Term of the Agreement
>
> F. Containerization [which includes the Rules on Containers]
>
> G. Lash
>
> All other terms and conditions of employment are local items which will be negotiated locally by each of the above port associations and their ILA locals in each respective port."

B. *Union*

4. ILA, an unincorporated labor organization, has for more than 50 years represented longshore employees who perform the work of loading and unloading ships, and all other functions incident thereto in the Port of New York as well as in all other applicable ports on the East and Gulf coasts of the United States. ILA has been certified by the NLRB as the exclusive bargaining representative of said employees (*See, Matter of New York Shipping Association*, 116 NLRB 1183 (1956)). It has negotiated and entered into collective bargaining agreements with CONASA, NYSA, and with the other constituent member associations of CONASA, covering the terms and conditions of employment of these employees in the CONASA ports. Similarly, ILA negotiates and enters into collective bargaining agreements covering the terms and conditions of employment of these employees in other ports on the East and Gulf coasts of the United States.

C. *Joint Labor Management Bodies*

5. The CONASA-ILA Container Committee is a joint labor-management board formed and created pursuant to the provisions of the 1974-77 collective bargaining agreement between CONASA and ILA for the purpose of implementing and administering in all six CONASA ports the CONASA-ILA Rules on Containers to insure clarity and uniformity of interpretation and enforcement. It is composed of an equal number of representatives of labor and management—one CONASA and one ILA representative from each CONASA port.

6. There is in each CONASA port a joint labor-management commitee consisting of an equal number of union and management representatives formed and created pursuant to the provisions of the 1974-77 collective bargaining agreement between CONASA and ILA and

to the provisions of the applicable local ILA collective bargaining agreement in each CONASA port. Each joint committee is authorized and responsible for the implementation and administration, within its particular port area, of the CONASA-ILA Rules on Containers. Each joint committee is empowered *inter alia* to hear and pass judgment on any violations of the CONASA-ILA Rules on Containers.

7. The NYSA-ILA Contract Board is a joint labor-management board consisting of an equal number of NYSA and ILA representatives. It is charged with the implementation and administration, within the Port of Greater New York, of the 1974-77 CONASA-ILA collective bargaining agreement and the local collective bargaining agreements entered into between NYSA and ILA. The NYSA-ILA Contract Board also acts as the NYSA-ILA Container Committee whose jurisdiction encompasses the CONASA-ILA Rules on Containers, their enforcement and administration. The NYSA-ILA Container Committee is empowered *inter alia* to hear and pass judgment on any violations of the CONASA-ILA Rules on Containers occurring in the Port of Greater New York.

D. *ILA's Traditional Work Jurisdiction*

8. For many decades, ILA members on the Atlantic and Gulf coasts have handled, to the exclusion of all other workers, all of the work in connection with the loading and discharging of cargo on ships. In addition, the ILA workers have also performed work on the piers which is known as terminal work. Terminal work includes all services rendered by contracting stevedores and steamship carriers either after the cargo has been discharged by the ship or before the cargo has been put aboard the ship. This work has included all work in connection with the preparation of such cargo for loading aboard the ship and all work preparatory to delivery of the cargo to inland carriers, after the cargo is discharged from the ship. The receipt and delivery of cargo has also been

performed by ILA workers. Traditionally, export cargo would normally be delivered by truck, rail or lighter to the terminal facility. ILA longshoremen would receive (and thereafter handle) the cargo from the tailgate of the truck, from the door of the railcar and from the first place of rest after removal from a lighter. This work was handled piece by piece and parcel by parcel.

9. Prior to the use of special equipment, such as hi-los, longshoremen would lift the cargo, piece by piece, into hand trucks and move it to a place of rest in the terminal building. Here, the cargo would be prepared for loading aboard the vessel. ILA checkers would tally the cargo, either truckside or at the terminal; ILA longshoremen would make up the drafts and pallets in preparation for lifting the cargo into the ship; ILA coopers would repair any damage to that cargo; ILA carpenters would prepare wooden boxes or containerlike devices where special security or care in handling was required; and ILA sorters might sort the cargo by type, port, hatch, etc.

10. After this cargo was prepared for loading, ILA ship gang workers would receive the cargo at a place of rest at the end of ship's tackle. It would be brought to this point by ILA terminal workers. From this place of rest, the cargo would be lifted into the ship's hold. In order to properly safeguard the cargo and protect the stability of the vessel, it was necessary for ILA carpenters to lay dunnage, make wooden separations and build up floors in the hold on which cargo could rest. Here, ILA longshoremen would again take the cargo, piece by piece, and place it in secure positions throughout the hold or hatch, following the loading plan of the ship's officer or stevedore supervision. Thus, cargo would have to be loaded so that it was readily accessible at the various ports at which the ship might call. Cargo which was to be removed at the first port-of-call would have to be so placed that the longshoremen at the port could remove such cargo without disturbing other pieces of cargo destined for later ports-of-call. The ship's labor also had

to take into consideration the weight, density, fragility, combustibility and other elements relating to particular pieces of cargo. In brief, the longshoremen performed a tedious, manual task which required many hours of labor as well as the skill attached to the know-how of ship's stowage and cargo peculiarities.

11. With respect to import cargo, the work performed by the longshoremen and other ILA crafts was substantially similar. A vessel arrived at the Port of New York which, in all probability, contained cargo for other North Atlantic ports such as Boston, Philadelphia, Baltimore or Hampton Roads. The New York longshoremen would identify the New York cargo and remove it from the ship. At the same time, they would be required to protect the cargo remaining aboard the ship by shoring or other devices. Prior to 1962, most vessels in the Port also had ILA hatch checkers who would tally the cargo as it was removed from each hatch and give a report to the terminal supervision, on a piece-by-piece basis, of the cargo actually removed. After being put to a place of rest on the pier, the cargo would be taken either by hand (or later by hand truck, and even later by hi-lo) into the terminal where it would be placed in designated areas. There, the cargo would be prepared for delivery to the consignee-drafts and pallets would be broken down, wooden boxes would be opened and unloaded, cargo would be sorted in accordance to type, size, shape, consignee, etc. Fragile or highly pilferable cargoes would be placed into special security areas known as cribs, security lockers, etc. Thereafter, the cargo would be delivered to the consignee. If the consignee had sent a truck to the pier, ILA longshoremen would take the cargo from the terminal and physically load the truck while ILA checkers kept a tally of this loading process. Similar functions were performed in respect to railcars and lighters or barges.

12. World War II brought about a use of various box-like devices into which cargo could be stored. The military had used such devices for special cargoes such as munitions, food stuffs, weapons, etc. After WW II, certain of the steamship carriers acquired some of the boxes and used them for highly pilferable, fragile or hazardous cargoes. However, such use was infrequent and of little consequence. On an average ship, such cargo might relate only to less than a fraction of one percent of the total cargo on a particular ship. However, the loading of cargo into, and the discharging of cargo out of, such devices was always performed by ILA labor at the pier or terminal. As these containers or devices became more common, certain exceptions began to develop. One such exception pertained to United States Mail. Prior to the use of these boxes, U.S. Mail was normally delivered to the pier in large canvas sacks. The eventual use of 8′ X 8′ X 8′ boxes (as well as some smaller) by the U.S. Mail was considered somewhat akin to the large canvas sacks. Further, the ILA longshoremen have historically had an intense patriotic nature. It was considered that the U.S. Mail should be permitted to move with facility, ease and little restriction. The same consideration was true with respect to the personal effects of military personnel. The ILA felt it had a special obligation to the embarking soldier or the returning warrior whose personal effects were entitled to special protection and quick transport.

13. Insofar as household goods were concerned, there was a special historical reason which emanated from the early 1930's. At that point in time, refugees from Nazi Germany were emigrating to the United States. Such household effects as they were able to take with them were almost invariably placed in large wooden crates similar to a household moving van. The total amount of such personnel household effects were negligible and again the longshoremen permitted their removal on and off the piers. When the Puerto Rican migration commenced in the period following World War II the same considerations were applied to such migrants.

14. The work opportunities thus presented created the approximately 43 million hours of work which longshoremen performed in 1958 in handling 12 million long tons of cargo. Thus, (at that time) productivity in the port averaged about .3 of a ton of cargo for every manhour worked. At the present time, there are approximately 19 million tons of cargo being moved with approximately 19.5 million manhours. Thus, the productivity per manhour in the Port has increased by 300%. If the productivity of 1958 has remained on the same basis, there would be approximately 60 million workhours for the ILA in the Port of New York today. Exhibit 2 annexed hereto sets forth NYSA Employment Statistics setting forth for contract years ending 9/30/51 to 9/30/76 inclusive total ILA employees registered with the Waterfront Commission in the Port of New York, total hours worked, total wages paid and total Guaranteed Annual Income ("GAI") expenses incurred.

15. Of the 12,264 men now in the workforce, an average of 7,500 men are hired on a daily basis. Seldom does the daily hiring reach the 8,000 man mark. Containerization still left a substantial amount of work on the piers and terminals to be performed by ILA members. ILA longshoremen and other dockworkers have worked on stuffing and stripping containers at the piers from the very inception of containerization to the present time. Every container steamship line in the Port of New York maintains an LTL (less-than-trailer-load) facility at its piers where substantial numbers of containers have cargo loaded into and discharged out of such containers by ILA members. Cargo going into such containers is delivered to such facilities and is handled from trucks by ILA workers who physically load the cargo into containers. Similarly, cargo from such containers is discharged by ILA workers who deliver such cargo to delivery platforms for loading by other ILA workers into trucks. In the year 1975 it is estimated that over 2,000 ILA employees worked over 3 million manhours handling over 1.5 million LTL tons of cargo. The purpose and intent of the ILA in pressuring NYSA and its members was to maintain and preserve such LTL work for ILA employees.

16. From the very inception of containerization, the ILA resisted strenuously the use of the container concept. The ILA opposed any concept which would take away any of the work traditionally performed by its members. This resistance has been manifested in strikes, wildcat job action, grievances, arbitration and court actions. The first arbitration involving containerization is dated November 13, 1958. In this proceeding, clerks, checkers and longshoremen at United States Lines' Piers 59 and 74 on the North (Hudson) River in Manhatan refused to handle six containers consigned to Bremerhaven and to Antwerp. Four of these containers were Railway Express containers "said to contain household and military effects." The other two were Ford Motor Company boxes "said to contain auto parts." The arbitrator directed that these containers be handled but recommended ". . . that the parties promptly meet for the purpose of achieving a solution of the entire subject. . ." The ILA did not accept this decision. On the contrary, it issued instructions that it would not handle any containers for any steamship lines who had not engaged in container operations prior to October 1, 1956. The ILA sought to prohibit any change in the method of handling containers from that followed by steamship carriers prior to 1956. The Vice President of United States Lines had conceded the pre-1956 practice in the industry of loading and unloading containers at pierside with ILA labor when he stated at a meeting of the Port of New York Joint LRC (a joint labor-management board formed to enforce and administer collective bargaining agreements between NYSA and ILA) held on November 19, 1958:

> "Let me clarify something. We have handled containers *prior to 1956, but containers that were loaded on the pier. That is, the cartons are loaded in the*

containers on the pier, and discharged. I am not going to mislead anybody." (*Emphasis added*)

For several weeks after the ILA's announcement, many containers in the Port were stopped. As a result of grievance discussions before the Port Arbitrator, on December 17, 1958, the Port Arbitrator issued an announcement that the ILA had agreed to handle containers for all companies engaged in the operations as of November 12, 1958 when the container matter was first brought before the Port of New York Joint Labor Relations Committee. Steamship companies not previously handling containers would give advance notice to the ILA of any such proposed new operations. In the meantime, the parties would negotiate with an attempt to reach a solution. The arbitrator announced further that in view of this agreement ". . . the container dispute currently in arbitration would accordingly be held in abeyance without prejudice to either party." Such negotiations and meetings were held for many weeks thereafter. However, no agreement could be reached and the parties entered the 1959 negotiations with containerization a major issue. .It would remain a major issue for the next eighteen years and is the critical issue in the current longshore negotiations which, as of this date, are marked by a general longshore strike against all containership carriers on the East and Gulf Coasts.

E. *The 1959 ILA Negotiations*

17. Various proposals and counter-demands were placed on the table:

(a) ILA's persistent demand was that all containers ". . . be opened on the pier and discharged by ILA."

(b) NYSA's initial counter-demand was for contractual language that would protect the "unfettered" rights of employers "to inaugurate and regulate automation operations. . ."

(c) On October 20, 1959, NYSA sought to satisfy the union's principal concern with consolidators by proposing a penalty of 25 cents per gross ton on cargo in containers loaded by forwarders and consolidators who did not employ ILA labor.

(d) This proposal was rejected out of hand by the ILA. In a proposal of October 29, 1959, the ILA demanded that the employers ". . . agree that their employees shall be protected against any job, work, and benefits losses which may result from unitized cargo or container use, and that their employees are entitled to a fair share from the benefits of increased efficiency."

18. After strenuous negotiations on this issued, the collective bargaining agreement of December 3, 1959 (covering the 3 year period from October 1, 1959 to September 30, 1962) recognized the right of employers "to use any and all types of containers without restriction or stripping by the Union." However, it was agreed that:

"Any work performed in connection with the loading and discharging of containers for employer members of the NYSA which is performed in the Port of Greater New York whether on piers or terminals controlled by them, or whether through direct contracting out, shall be performed by ILA labor at longshore rates." (Section 8(c), Memorandum of Settlement, December 3, 1959).

The NYSA-ILA 1959 Memorandum of Settlement is attached as Exhibit 3. It was further agreed in the 1959 Memorandum of Settlement that the parties would negotiate, and on failure to agree, arbitrate the royalty to be paid on shipper load containers which are loaded or unloaded away from the pier by non-ILA labor. After a lengthy arbitration was held on the container royalty matter, an award was issued on November 21, 1960 fix-

ing the amount of the royalty at 35 cents per gross ton on conventional ships, 70 cents per gross ton on partially automated ships, and $1.00 per gross ton on fully automated ships. The Arbitration Award is attached as Exhibit 4.

F. *The Period Following the 1959 Negotiations—A Period of Labor Strife.*

19. The 1959 negotiations were no sooner completed before labor strife, in the form of wildcats and quickly stoppages, erupted throughout the Port in protest of the loss of job opportunities caused by containerization. The parties began the arduous task of applying the new contractual language to actual situations. The union's position during these many grievances was that the 1959 negotiations only permitted the free movement of containers in the area outside of the Port. After many work stoppages and months of discussion, NYSA issued the following statement to the ILA on February 28, 1962, to clarify NYSA's interpretation of Section 8(c) of the 1959 Memorandum of Settlement:

> "Where an employer member of NYSA supplies a container which is the property of such member, to a consolidator for loading or discharging of cargo in the Port of Greater New York, it will be stipulated that such container must be loaded or unloaded by ILA at longshore rates."

The February 28, 1962 Interpretation is attached as Exhibit 5. Thus, from February 28, 1962, the rule that ILA labor would strip and stuff a container of a steamship carrier supplied to a consolidator, which was the traditional custom and practice in the industry, was codified in the established labor relations law in the Port of New York.

20. This rule was shortly thereafter applied against Sea-Land Services, Inc., which was the inaugurator of fully-containerized operations, using specifically designed

cellular container ships. Sea-Land first commenced full containership service in 1958 in the New York to Puerto Rico trade. In 1962, Sea-Land was found by the Joint NYSA-ILA Labor Relations Committee ("LRC"), to have violated the contract in supplying containers to consolidators. The minutes of the LRC proceeding is attached as Exhibit 6.

21. The fight against containerization was led by the ILA's President, Thomas W. Gleason, who has prophetically stated the impact of containerization on the job opportunities of the ILA's members. Thus, at the 1959 ILA Convention (July 13, 1959), Mr. Gleason stated:

> "I believe that the cargo container will be forced on shipping lines through competition . . . I am convinced that it has got to come, and when it does come, its effects on us can be tremendous. It is not too farfetched to estimate that we stand to lose, in the full force of the container use, 8,000 to 9,000 jobs in the New York area alone, and a proportionate number in all other ports. This amounts to 30% of the membership. . ."

G. *The Period from 1962 Through 1968*

22. The 1959 statement of President Gleason has continued as the basis for ILA policy in all ensuing negotiations. In 1962, NYSA was seeking to obtain relief from restrictive work practices under the collective bargaining agreement. After a lengthy strike, a Presidential mediation panel, headed by Senator Wayne Morse, recommended that the parties agree to a comprehensive study on manpower utilization and job security by the United States Department of Labor. This study was to be made during the term of the new 2-year agreement and the results of such study were to be the subjects of bargaining in the 1964 negotiations. As a result of the Government's intervention, no changes were made in the containerization agreement (Exhibit 3, p. 2, 1959 Memo-

randum of Settlement, Section 8(c)), although the ILA had demanded that all containerized cargo be loaded or discharged by ILA labor only. The fact that the contract language did not change, did not end the constant labor struggle against expanded containerization. Thereafter, containers found by the ILA, which it considered violated the contract were stopped. It had been the employer position that the provisions of Section 8(c) of the 1959 Memorandum of Settlement (Exhibit 3, p. 2) applied only to containers owned or leased by employer members of NYSA. The ILA position was to the contrary. Grievances and work stoppages continued. Those that involved the supplying of the carriers' containers to consolidators were resolved in favor the the ILA; other situations for the most part went unresolved. Countless meetings held on the subject by representatives of both NYSA and ILA were unable to finally resolve the many troublesome issues.

23. At the advent of the 1964 negotiations, the ILA again made its demand that all containers be loaded and stripped by ILA deep-sea labor. However, the major issue in the 1964 negotiations related to the recommendations of the Department of Labor's Manpower Utilization Study which recommended certain changes in the work rules and additional job security for the worker. After lengthy arduous and strike-marked negotiations, an agreement was worked out giving the employers certain concessions in the area of manpower utilization and giving to the union members the first GAI plan in the industry. The containerization provisions of the labor agreement remained unchanged. No sooner had the contract been agreed to, than the ILA renewed its efforts in its fight against containerization. Again, there were many incidents involving stoppages of containers on the waterfront. In November of 1966, the ILA demanded that the agreement be reopened on the subject of containers. NYSA refused but did meet with the union over a long period of time in an attempt to find some common solution to this

perplexing and long-continuing problem. Meetings were held in November, December of 1966 and January, February of 1967. NYSA on December 15, 1966 issued a motion proposing strict contract compliance with respect to the use of containers and proposing a joint study to assist workers who were displaced by containerization. The inability of the parties to find areas of agreement apparently convinced the ILA that broad relief could only be attained in the course of the negotiations. By 1967, containerized cargo had grown substantially to approximately 2.6 million long tons, or approximately one-fifth of the cargo handled in the Port of New York. In 1967 Sea-Land Service, Inc. introduced the first fully-containerized vessel into the large North Atlantic trade. Many major steamship carriers then announced plans for embarking on container operations and many new and fast containerships were being built in shipyards throughout the world.

24. A full year before the 1968 negotiations commenced, the ILA held its conventions in Miami Beach, Florida, during the period July 10 to July 21, 1967. Resolutions were passed in opposition to containerization calling for all containers to be stuffed and stripped by ILA labor at deep-sea rates and at water-front facilities, piers or terminals. The ILA thus entered the 1968 negotiations with a mandate from its Conventions that containerization be seriously restricted. NYSA entered the negotiations with a desire to protect the new innovative method of cargo movement.

H. *The 1968 ILA Negotiations*

25. Negotiations begain in July of 1968. They were destined to be heated, protracted and marked by a long strike that lasted 57 days in New York and over 100 days in the other ports along the East-Gulf coasts of the United States. The major issue in these negotiations was first, and foremost, the issue of containerization. In its report to the President of the United States, the Board

of Inquiry, established pursuant to the national emergency provisions of the Taft-Hartley Act, stated in its report, dated October 1, 1968 (attached as Exhibit 7):

> "There are two overriding issues and the failure to resolve these has prevented the parties from reaching agreement on other items."
>
> "The two critical issues relate to union-wide collective bargaining and the impact or consequences of containerization or mechanization." (Exhibit 7, p. 3)

26. In the opening days of the negotiations, the goals of the ILA and the goals of NYSA on containerization were diametrically opposed. The ILA demand was that all containers and containerized cargo was to be stripped and loaded by ILA labor. NYSA's first proposal sought the free movement of containers of all types without restriction. These counter demands were both made on the same day, namely, July 10, 1963. In the almost ten years since the 1959 negotiations NYSA and ILA had essentially agreed that containers coming from consolidators were to be stuffed and stripped by ILA labor, at the piers or docks. This was the clear thrust of Section 8(c) of the 1959 agreement. That which NYSA sought to preserve was the free and unfettered movement of non-consolidated full shipper's loads of containers moving in great volume through the Port of New York.

27. From August 23 of 1968 and continuing into January of 1969, the subject of containerization was almost a daily item for discussion and continued disagreement in the negotiating sessions. On October 1, 1968, the ILA called a coast-wide strike in all ports from Maine to Texas. This strike was enjoined under the emergency provisions of the Taft-Hartley Act shortly after it started. Negotiations continued in the following months, again with very little progress. It was not until after NYSA agreed to increase GAI benefits, which up to that time covered 1600 hours per year, to 2,080 hours per year, that ILA indicated a willingness to explore changes in its

position which would permit the continued free flow of shippers' loads of containers. This improvement in GAI was to cost the employers in the Port of New York in the contract year ending 9/30/76 over $50,000,000 per year in additional benefits (Exhibit 2). It was the *quid pro quo* for the ILA moving away from its firm position of adamancy that *all* containers be stuffed and stripped at the docks by ILA labor. By January 12, 1969, basic agreement had been reached in the Port of New York. The 3-year collective bargaining agreement (attached as Exhibit 8) to be effective for the period October 1, 1968 to September 30, 1971 contained the following three major items:

(a) Wage and fringe benefit increases amounting to $1.60 per hour over the three-year term;

(b) An increased GAI of 2,080 hours per year for all qualified workers covered by the various ILA craft agreements; and

(c) The Rules on Containers

28. The ILA had by the collectively-bargained Rules on Containers thus preserved the protection it had won beginning in 1959, and which it had fought for with countless strikes and work stoppages. On the other hand, the employers won the right to continue to move most containers, namely non-consolidated full shipper loads, without stuffing or stripping by union members. Thus, manufacturers' loads or full shippers' loads, as well as all containers coming from or going to points fifty or more miles from a port, constituting 80% of the containers moving in the Port of Greater New York, were excluded from the stuffing and stripping requirements. The ILA insisted on each and every one of the eight different rules set forth in Rule 3 of the Rules on Containers and entitled "Rules on No Avoidance or Evasion". Each of these rules was intended to assure that the employers and carriers would live up to their obligations

and stuff and strip at the piers all LTL or consolidated container loads. Most importantly, the union insisted on a clause set forth in Rule 3(h) which, in effect, permitted the renegotiation of the rules if the purpose of protecting and preserving the work jurisdiction of the ILA was not accomplished by the provisions of the rules. Rule 3(h) was resisted strongly by the employers who capitulated under pressure at a time when the entire coast was shut down and where the effect on the national economy was extremely grave.

29. The labor agreement reached on January 12, 1969, in New York did not end the strike. The ILA refused to submit the agreeemnt for ratification until all other ports had accepted the basic New York contract. Refusal to bargain charges were brought to the National Labor Relations Board by NYSA. The NLRB sought and secured an injunction mandating a referendum by the ILA members in New York. On February 14, 1969, the agreement having been accepted by the membership, the strike ended and there was a return to work in New York. In other ports, the strike continued. Finally, on April 14, 1969, agreement was reached in the last holdout ports in Texas. The strike had lasted a total of 115 days in various ports. In the last analysis, however, the ILA obtained approximately the same container agreement in all ports from Maine to Texas.

I. *The Period Following the 1968 Negotiations—Second Circuit and NLRB Uphold Legality of Rules on Containers*

30. The new collective bargaining agreement created a container committee which ". . . shall have the responsibility and power to hear and pass judgment on any violations of these rules." (Exhibit 8, p. 70 Rule 3(g)). Shortly after the negotiations ended, the functions of the committee were given to the NYSA-ILA Contract Board. During the period following the contract, it met with

great frequency and held hearings on alleged violations of the Rules. This committee has made many findings of violations, especially in cases involving consolidators. Attached as Exhibits 9A through 9G inclusive are various container violation reports which were issued during that period, advising all stevedores and carriers of the necessity for strict compliance with the Rules on Containers.

31. The work of the NYSA-ILA Contract Board with respect to containerization continued with almost weekly meetings. In May of 1970, the ILA gave notice that the traditional work jurisdiction of deep-sea longshoremen was being threatened by certain practices including letters of concurrence issued by certain members of the NYSA. (A concurrence was an authorization issued by a carrier that customs inspection could be carried out at a facility away from the piers.) The ILA demanded assurances from NYSA that the Rules on Containers would be enforced according to their terms and all concurrences would be withdrawn. The ILA charged that these concurrences would be withdrawn. The ILA charged that these concurrences were being used as a device to have containers moved to consolidators' stations where customs inspection would take place. Extensive negotiations were held between the NYSA and ILA on this subject. The parties were unable to reach agreement. Thereupon, ILA invoked the provisions of Rule 3(h) (Exhibit 8, p. 70) and issued directions to its membership that all containers in all North Atlantic Ports were to be stuffed and stripped at the piers. This stoppage of all containers continued for several days. Finally settlement was reached on May 27, 1970 (Exhibit 9D).

32. The legality of the Rules on Containers was tested in the Courts and before the NLRB by Intercontinental Container Transport Corporation ("ICTC"). ICTC brought an action in the federal courts against NYSA and ILA, seeking to enjoin the enforcement of the Rules on Containers based on their alleged illegality under the

Antitrust Laws. The United States Court of Appeals for the Second Circuit, *International Container Transport Corp. v. New York Shipping Association, Inc. and International Longshoremen's Association*, 426 F.2d 884 (2nd Cir. 1970), upheld the lawfulness of the Rules on Containers as valid work preservation provisions. Similarly, the Rules on Containers were held to be valid work preservation rules by the 22nd Region of the National Labor Relations Board ("NLRB") in NLRB Case Nos. 22-CE-12 and 22-CC-389. In that case, ICTC filed an unfair labor practice charge asserting that NYSA and ILA had by the Rules on Containers violated 8(e) of the National Labor Relations Act, as amended, and that the ILA had violated 8(b)(4)(B) thereof, by entering into "an agreement whereby said employer-member ceases or agrees to cease doing business with other employers." After extensive analysis and investigation, the charges were dismissed and the validity of the Rules on Containers upheld since they were found to involve legitimate union concern and a proper subject of collective bargaining. The determination of John J. Cuneo, Regional Director of the NLRB, is annexed as Exhibit 10. On appeal, the dismissal by the Regional Director was affirmed by the General Counsel of the NLRB in a decision dated October 16, 1970, which is attached as Exhibit 11.

J. *The 1971 CONASA-ILA Negotiations*

33. Negotiations between CONASA and ILA continued on various dates from November 16, 1971, through February 14, 1972. The ILA had commenced a coast-wide strike on October 1, 1971, because of the breakdown of negotiations and the GAI issue in New York. This strike continued until enjoined by a Taft-Hartley injunction in various courts during the period November 26, 1971 to November 29, 1971. In the negotiations with CONASA, ILA was concerned not so much with the substantive container rules but with methods of assuring that the Rules

on Containers were uniformly and non-discriminatorily enforced and applied. Most of the negotiations during the 1971-1972 period were spent in discussions with respect to methods of enforcing compliance with the Rules.

34. The result of these lengthy negotiations between CONASA and ILA was that the Rules on Containers were adopted as the CONASA-ILA Rules and embodied in the present collective bargaining agreement between CONASA and ILA covering the period from November 14, 1971 through September 30, 1974. The CONASA-ILA labor agreement is attached as Exhibit 12.

35. Soon after the contract had been agreed to by the ILA, the ILA continued its efforts to obtain full and complete enforcement of the Rules on Containers. At meetings with employer representatives the ILA again reiterated its position that the carriers were violating the contract. On May 11, 1972, the ILA, by Thomas W. Gleason, President, served notice on NYSA that violations of the Rules on Containers ". . . have now grown to where there is a complete abrogation and disregard of the contract with respect to the loading and stripping provisions . . .". The ILA served notice that unless all violations are stopped immediately the ILA would invoke its contractual rights under 3(h) of the Rules on Containers (Exhibit 12, p. 3). In response thereto, on May 12, 1972 the President and Chairman of NYSA sent a letter to all steamship carriers and direct employers that the Rules on Containers must be strictly observed (Exhibit 9G). In this connection it was stated that: "The ILA is particularly disturbed by the increased use of consolidators and truckers to perform work which is clearly within the jurisdiction of the ILA under the contract." It was stated that spot audits and investigations would commence immediately.

36. From that point forward, the two container investigators, employed by the joint NYSA-ILA Container Fund, to uniformly enforce the Rules on Containers and to uncover and investigate violations thereof, were sup-

plemented by NYSA employees who began to visit the many consolidation facilities in the Port of Greater New York where containers were being stuffed and stripped by other than ILA labor. After the above letters (Exhibit 9G) were distributed, many meetings of the NYSA-ILA Contract Board sitting as the joint NYSA-ILA Container Committee were held and reports of investigations received. In the course of these meetings, various steamship carriers were called in for the purpose of determining whether or not the Rules were being violated. Despite the best efforts of the parties, the ILA continued in its position that the Rules on Containers were not being lived up to especially with respect to consolidators' facilities. Finally, on October 31, 1972, a notice was sent by the NYSA-ILA Contract Board to all steamship carriers and direct employers. A copy of this letter is attached as Exhibit 13. This letter again warned that the ILA was concerned with "the spread of consolidation stations operated by steamship carriers as well as those outside the industry" and that the ILA would invoke 3(h) unless the violations were discontinued.

37. The number of violations found by the container investigators continued to grow. The ILA had stated many times that the carriers could stop the violations by not supplying their containers to consolidators or to others who used them to circumvent the contract. On November 15, 1972, notice was given to the principal container lines in the Port of New York to attend a meeting at the Whitehall Club on November 20, 1972. At this meeting (the minutes are appended hereto as Exhibit 14) the ILA took the strong position that supplying containers to consolidators was a violation of the contract and that all containers should be stopped unless the stevedores and carriers began to live up to the agreement. After the meeting of November 20, 1972, counsel met on several occasions for the purpose of drafting a document entitled "Enforcement of Rules on Containers". This document carried out the intent of the meeting of November 20,

1972. It was circulated to all carriers for their comments on December 19, 1972. A copy of the document and covering letter is attached as Exhibit 15. Certain changes were made in the draft between December 18, 1972 and its presentation to the meeting of the CONASA-ILA Container Committee held on January 25-29, 1973, in Dublin, Ireland. A copy of the Minutes of the Dublin meeting together with Interpretive Bulletin No. 1 which was issued as a result thereof, is attached as Exhibit 16. Interpretive Bulletin No. 1 was the collectively bargained interpretation of the Rules on Containers formulated by CONASA and ILA for the purpose of promulgating rules for the uniform and effective enforcement of the Rules on Containers. It codified *inter alia* the standing principle first enforced against Sea-Land Services, Inc. in 1962 that a carrier is prohibited from supplying its containers to consolidators. The Dublin Rules were viewed as the means needed to restrain violations of the Rules on Containers. If CONASA, NYSA and the ocean carriers had refused to accept the Dublin Rules, the ILA would have struck and stopped all containers in the North Atlantic ports, including the Port of New York. Soon after their enactment, the Dublin Rules were applied against various steamship carrier members of NYSA. In 1973, 1974 and 1975, these carriers, including those named in the complaint, *viz.* Transamerican Trailer Transport, Inc. ("TTT") and Puerto Rico Maritime Shipping Authority ("PRMSA"), paid many hundreds of thousands of dollars for not obeying the Dublin Rules and for permitting consolidated containers to move over their docks without stripping or stuffing by ILA workers. The carrier members of NYSA were instructed to insist that LTL cargo be delivered to the piers in uncontainerized form.

K. *1974 Negotiations*

38. As had been the case in every major negotiation with the ILA since 1957, and specifically including the 1959, 1962, 1964, 1968 and 1971 negotiations, the prin-

cipal issue faced by the CONASA-ILA negotiators continued to be containerization and its tremendous impact on the job opportunities of the ILA employees on the piers and terminals in the North Atlantic coastal ranges. The negotiations commenced again with the demand on the ILA that all containers be stuffed and stripped on the piers by the ILA. In presenting this demand at the commencement of the CONASA-ILA negotiations, ILA President Thomas W. Gleason again reiterated the oft-repeated position of the ILA that containerization had deprived the ILA of countless job opportunities and that in order to protect its traditional work jurisdiction and the pierside jobs of the ILA longshoremen and related crafts, the ILA would have to insist upon the right to stuff and strip every container at the pier facility with deepsea ILA labor.

39. In pointing out the background of this demand, Mr. Gleason stated that the ILA work force in the Port of New York during the period 1968 to 1974 had been decimated by the effects of innovation. In this regard he pointed out that the almost 24,000 longshoremen who had labored almost 40 million manhours in the contract year 1967/68 had been reduced to 13,000 longshoremen in the Port of New York who had labored only approximately 24.5 million hours in the contract year 1972/73 (Exhibit 2). He also complained bitterly that the Rules on Containers were not being lived up to by the employer members of CONASA, the steamship companies and the stevedores to the full extent that they should be lived up to and that certain consolidators or non-vessel operating common carriers ("NVO'S"), had conspired with others to circumvent the Rules on Containers by various devious devices. He stated that the ILA could not continue to give up work opportunities to innovation in areas where the work had been traditionally performed by the ILA and where it was of the nature that could just as easily be performed on the piers and terminals as it had traditionally, than at inland installations within a 50-mile area of each port by outside groups.

40. CONASA's initial position was that all containers should be permitted to move without any restriction by the ILA. The mere making of this demand led to almost a complete breakdown of the negotiations at that point. The ILA immediately rejected any such positions; said it was a regression; that the ILA could not tolerate it; that the ILA would not be pressured out of business; and, that the stated desires of the ILA for a contract without a strike should not be taken as any sign of weakness. He stated that if CONASA was to take any position of that type, that a strike would be certain and assured.

41. As a result of the diametrically opposed positions of the parties at the first negotiating session in March, 1974, no further formal meetings were held until June, 1974. However, during the interim period, various committees of ILA and CONASA, as well as NYSA, met with the ILA seeking to find a means to settle and resolve the container issue. The desire of the shipping industry was to permit shippers as much flexibility as possible without, at the same time, causing a certain work stoppage. The negotiations had been entered into with publicly stated declarations by both the industry and labor that the shippers need not have any fear of a work interruption in October, 1974 as had been the unfortunate history for some 30 years prior thereto.

42. It appeared to the members of CONASA, as well as the members of the various shipping associations in the North Atlantic, that the container issue would have to be resolved and resolved on a fair, equitable and proper basis if progress was going to be made in the negotiations. Therefore, a median position between that of the ILA and that of CONASA would have to be found. Many proposals were discussed and analyzed. In exploring all of the various alternatives, and various other methods which might be used to protect the work opportunities and job opportunities of the ILA and its workers, the parties kept on coming back and back again to the same rules which had been in existence from 1959 through the time of the negotiations.

43. The formal negotiations between CONASA and ILA commenced at the Di Lido Hotel in Miami Beach, Florida on June 11, 1974. On each and every day, as well as evening and night, from June 11 right to the end of the negotiations on June 21, 1974, the major issue and sometimes the only issue separating the parties was again this issue of containerization. During the course of these negotiations the discussions continued almost without end. Drafts, redrafts, attempts at solutions all proved unavailing. The parties finally realized that the only way that progress could be made was to continue the Rules which each of them had found to be fair and equitable. These Rules were the same Rules that had been in effect since 1959 and had been codified in 1968 and accepted in their totality by CONASA and ILA in 1971.

44. The parties then turned their attention to the simplification of the Rules and their redrafting and revision for the purposes of clarity and better understanding. It was decided by the parties to incorporate Interpretive Bulletin No. 1, the so-called Dublin Rules (Exhibit 16) into the 1974-77 Rules in order to assure the effective implementation of the Rules and to provide the means to restrain and proscribe violations of the Rules. The final agreement was reached on the 1974-77 Rules on Containers in the same form as they existed for years (See Exhibit I to General Counsel's Exhibit 3). The execution of the 1974-77 Rules on Containers did not put to rest the ILA's continuing complaint that the steamship carriers were violating the contract. In late March, 1975, the ILA announced its intention to exercise its right to reopen the Rules because of its claim that the carriers were not abiding by their contractual commitments. On April 28, 1975, the ILA unilaterally suspended the Rules and began to strip all containers in all North Atlantic Ports with the exception of shippers' loads. This job action continued for almost a month during which intensive negotiations were conducted between CONASA and ILA to settle the disputes. Finally, on May 30, 1975, the parties resolved

their differences with the execution of the clarified and restated 1974-77 Rules on Containers (Exhibit J to General Counsel's Exhibit 3). Containerization, however, continues to this day to be a hotly contested and complex issue in longshore labor relations. The current collective bargaining negotiations for a new contract to commence October 1, 1977 are stalemated. The ILA is now engaged in a strike against all containership carriers from Maine to Texas. Containerization and its effects are the critical issues separating the parties.

* * * *

/s/ John M. Haynes
JOHN M. HAYNES

AFFIDAVIT OF JAMES J. DICKMAN

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

James J. Dickman, being duly sworn says:

1. I am the President of New York Shipping Association, In. ("NYSA"). For over ten years, I have been one of the chief negotiators of the labor agreements between the shipping industry and the International Longshoremen's Association, AFL-CIO ("ILA"). During a *six-year* period from 1971 to 1977, I was also President of the Council of North Atlantic Shipping Associations ("CONSA"). At the present time, CONASA, NYSA, West Gulf Maritime Association, Southeast Florida Employers Association and the Mobile Steamship Association bargain jointly as a management team on all master contract issues, including containerization. The resulting contracts cover some 36 ILA ports from Maine to Texas.

* * * *

2. I have been in the stevedoring industry for more than 35 years. I started as a longshoreman, later became a checker, rose to pier superintendent after rising through various supervisory positions, became a vice-president and, eventually, the President and Chairman of Universal Terminal Operating Company, which was among the largest stevedoring companies in the United States with operations on the Atlantic, Gulf and Pacific coasts of the United States. Because of my experience, I am thoroughly familiar with the work of the longshoremen from 1943 to the present time. I also know the work of truckers because for several years I managed a trucking company with twelve large trucks which delivered cargo between piers.

* * * *

3. I have been involved in labor negotiations in this industry for almost 30 years. I was employed as a consultant by the industry in 1962 and helped prepare a major report by the United States Department of Labor on the functions of Longshoremen and on longshore manpower utilization. I was on the piers on April 26, 1956 when the first ship loaded with containers arrived in the Port of New York. The ship was an old converted tanker with 58 loaded containers strapped to its deck. Its arrival marked the beginning of industry unrest on the issues of technological innovation and job preservation. That ship was struck and the industry has had to negotiate on this issue from that day down to the present.

* * * *

7. The above affidavit presents a full picture of all facts through 1977. The period of time covered by that affidavit ended during the 1977 strike. That strike again was over the ILA's insistence on some form of job security and job preservation because of the continued impact of containerization during a period when the Rules on Containers were enjoined by NLRB injunctions in the Conex and Twin cases. The strike lasted from October 1, 1977 to November 26, 1977 at a cost to the industry, the worker and the public of an amount described by the United States Department of Commerce to be in excess of one billion dollars. The outcome of these negotiations, as shown by the attached settlement agreement (Exhibit A), was:

a) CONASA's and NYSA's agreement that the legal fight in defense of the Rules on Containers was to continue with full vigor; and

b) the creation of a new job security program intended to protect contributions to welfare, pension, and GAI funds during such legal fight. This program is known as the Job Security Program (JSP).

8. In 1980, management and the ILA were able to negotiate an early master contract on May 27, 1980, pri-

marily because in September of 1979, the United States Court of Appeals for the District of Columbia, in the *Dolphin* case, had reversed the determination of the NLRB and found the Rules on Containers to be valid work preservation rules. At the start of negotiations, in May, 1980, arguments had already been heard by the Supreme Court (on April 22, 1980) and therefore, management was able to convince the ILA that the issue of containers should be laid aside to abide by the decision of the Supreme Court. The ILA's agreement, however, was tied to management's acceptance of the language in a clause in the master contract which gave the ILA the right to reopen the master agreement in the event that the rules on containers were determined to be illegal.

* * * *

9. The history of the negotiations show that whenever containerization was an issue, a long strike occurred. This was the history of 1959, 1962, 1964, 1968, 1971 and 1977. In 1974 and 1980, when the issue was set aside pending judicial or administrative decisions, there was no strike. On the basis of such history, it is established that the ILA's quest was solely and exclusively for job preservation. The Supreme Court decision did not finally settle the containerization issue. Instead, the matter was remanded to the Board.

* * * *

10. I was initially able to convince the ILA not to immediately reimplement the Rules but to seek the General Counsel's cooperation in an expedited determination by the Board. To this end, I instructed our counsel to communicate with the General Counsel immediately after the June 20, 1980 decision of the Supreme Court, and to seek to implement a procedure for such speedy resolution. On July 2, 1980, counsel for ILA, NYSA and CONASA called upon the General Counsel's office and met with Deputy General Counsel Norton Come, Assistant General Counsel Joseph E. Mayer and other representatives of

the General Counsel's office. The request at that time was for agreement on a single jurisdiction to hear all Rules matters, a quick application to the various courts to remand all pending matters back to the Board and agreement to seek to vacate all existing injunctions. The General Counsel's office agreed to take our various requests under advisement. Unfortunately, he never responded to them. In the meantime, our counsel and ILA's counsel moved assiduously in all Courts and succeeded (with some opposition from G.C.) in having Orders of Remand entered by the Courts of Appeals for the Second Circuit, Fourth Circuit and Fifth Circuit.

* * * *

15. Meetings were held with the union on an almost round-the-clock basis and in a crisis atmosphere. I have never had more difficult negotiations. The frustration of labor in finding themselves faced with further years of endless litigation while their jobs were being eroded was understandable. However, it was just as frustrating to management to be unable to respond in any meaningful manner since General Counsel had taken a position he knew many years of continued uncertainty. Finally, both labor and management agreed on the only realistic solution; that the Rules on Containers were to go into effect on January 1, 1981, except in any port where an injunction was in effect.

16. We gave the general public as well as the NLRB, the FMC and all other interested bodies, over three weeks notice of our intent. The Rules went into effect on January 1, 1981 and the cargo is moving without any difficulty. Cargo of all persons is being accepted at the piers and is being delivered to the piers. It has been made clear to all persons that the rules apply only to containers owned or leased by steamship carriers. These are the containers in the *sole and absolute* control of the steamship carriers. The Carrier Containers' Council, an arm of management made up of all the major steamship carriers, issued the following notice:

NOTICE TO ALL CARRIERS AND DIRECT EMPLOYERS:

In view of the collective bargaining agreement, dated May 27, 1980, and the provisions of the December 6, 1980 agreement, the industry has agreed to implement the Rules on Containers effective January 1, 1981.

In connection with the implementation of the Rules, it would be advisable for you to issue instructions to your customers as follows:

1. *The Rules on Containers apply only to containers owned or leased by ocean carriers.* Consequently, any container which actually belongs to a shipper and for which the carrier does not pay a per diem or rental charge is not subject to the Rules. In those instances where the carrier assumes the lease obligations of a shipper or pays a per diem to a shipper or to a leasing company the Rules do apply.

2. Any customer whose cargo is subject to Rule 1 of the Rules on Containers will be serviced on a fair and non-discriminatory basis if he will bring his loose cargo lots to the pier where containers and cargo space accommodations will be made available and the cargo lots will be loaded into containers by longshoremen at the waterfront terminal. Conversely, on import cargo subject to Rule 1 the containers will be unloaded by longshoremen and the individual cargo lots made available for pick-up by the customer. (emphasis supplied).

* * * *

17. Thus, the issue in this proceeding does not involve, as the General Counsel argues, the general question of containerization and intermodalism. It deals only with questions relating to steamship carriers' and employers' containers. All other containers, those of railroads, those of truckers and those of shippers, are totally exempt.

* * * *

18. The fact that the Rules on Containers apply only to consolidated containers, including those containers shortstopped by truckers within the 50 mile area, also means that more than 80% of all containers are moved without stuffing or stripping by ILA longshoremen. Thus the comments made in various affidavits that there is insufficient space on the various piers and terminals for longshoremen to handle each containers is preposterous. First, what possible difference does it make? The question of physical availability of space is not a criteria in any of the cases. But more importantly it should be made clear that at container piers in the Port of New York alone there now exists more than 3,000,000 square feet of modern, enclosed, heated, ventilated stuffing and stripping sheds. There is also over 2,000,000 more feet on adjacent piers and sheds—all underutilized. There are more than 1,100,000 sq. ft. of such space on the Packer Avenue and Tioga Street Terminals in Philadelphia; another 800,000 square feet is available on adjacent piers; more than 1,000,000 square feet of space is available for stripping on the container facilities in Baltimore; and the facilities in Hampton Roads, Portsmouth, Newport News, and Norfolk exceeded 1,490,000 square feet. As an expert in stuffing and stripping, having performed such functions for many, many years, I can frankly tell the Court that containerization would have to grow greatly before these ports would run out of space to handle those containers which are required to be stuffed and stripped at the pier under the Rules. It should be noted that, depending upon the commodity, from four to ten containers of 40 feet each can be stripped by a team of longshoremen (three longshoremen and a checker) in a single eight hour work day. If it were necessary, here in the Port of New York we could double the number of containers we have traditionally stuffed or stripped without running out of space. While I am not as knowledgeable as to the other ports, I am informed that the same is true in each of them.

* * * *

/s/ James J. Dickman
JAMES J. DICKMAN

AFFIDAVIT OF EDWARD J. HEINE, JR.

STATE OF NEW YORK)
): ss.:
COUNTY OF NEW YORK)

EDWARD J. HEINE, JR. being duly sworn, says:

I am a partner in the law firm of GILMARTIN, POSTER & SHAFTO, with offices at 26 Broadway, New York, New York 10004. I have been in the steamship industry for more than twenty-five years, serving in various capacities including President and Chief Executive Officer of United States Lines, Inc., an American flag steamship company presently operating a large fleet of automated container vessels. It also owns a number of breakbulk ships, most of which have been chartered to the Military Sealift Command.

I have been personally involved in the negotiations and implementation of the Rules on Containers from their very inception in 1968. Beginning in 1967 I was a member of the Labor Policy Committee of the New York Shipping Association, Inc., the organization representing steamship carriers, direct employers and other employers of waterfront labor in negotiating with the International Longshoremen's Association.

In 1968 I became a director of New York Shipping Association, Inc. and continued as a director through September 3, 1980, with the exception of a short period in the early seventies.

In addition to the above, I have been a director of JSP Agency, Inc. since the inception of that longshoremen's security program in December of 1977. This Program is intended to protect longshore employees covered by pension, welfare and GAI plans in some 36 major ports on the Atlantic and Gulf coasts from short-falls in contributions to these plans. This program was instituted primarily to protect those plans from the tremendous impact of innovation. I am therefore fully familiar with the various studies made by the JSP Agency, Inc. as to the total tonnage moving in the Atlantic and Gulf coast ports upon which ILA deepsea longshore and other ILA craft locals are employed.

In my capacity as President and Chief Executive Officer of USI, (and prior thereto, as Executive Vice President) I was fully familiar with the development of containerization, its impact on the longshore work force, the investments made by the major carriers for new vessels and equipment, and the continuing growth of innovation. I would make clear that the early position of USL, to which I fully subscribed, was that the ILA should not resist containerization and should permit steamship carriers to use containerization without any restriction. This was the position of our Company at the inception of negotiations in 1968; it was also the unanimous position of all other steamship carriers on the Negotiating Committee at that time. The Rules on Containers were not easily agreed to, either by management or by labor. During the course of a 57-day strike in the 1968 negotiations, both sides continued to maintain their respective positions. So great was the impact of the strike on the public and the national economy that the President of the United States sent in a Presidential Mediator. This Presidential emissary, David Cole, exercised his vast persuasive powers to get the industry to agree on the Rules.

In looking back at these negotiations it appears that David Cole had in mind nothing more than a codification of practices followed in the Port of New York during the period following the initial introduction of containerization. From 1957, due to grievances, arbitration, strikes and court proceedings, the following practices or principles evolved.

A. The ILA would agree that containers containing the goods of one shipper (manufacturer's label) could move without restriction or handling by the ILA;

B. Cargo in containers which belonged either to several shippers or consignees and which was to be handled within

a port area by employees other than employees of the cargo should be handled only by the ILA at the piers;

C. Both parties understood that this would mean that most containers would move without stripping and stuffing, but there would be reserved for the ILA labor that small remaining part of the work which normally was performed by them when LTL loads of cargo were either delivered to or picked up at the pier;

D. During this period, 1957-1968, some common law interpretations began to develop with respect to what should be deemed a port area within which containers would have to be stuffed or stripped. The genesis of the term "fifty-mile-rule" developed during this period, partly as a result of the geographical make-up of the Port of New York. At that time the port extended from Point Leonardo on the south to Poughkeepsie on the north; on the east all of Long Island was considered a part of the Port, and any vessels worked in that area were normally worked by ILA labor. Similarly the New Jersey port area included Edgewater, Weehawken, Bayonne, Union City, Jersey City, Port Newark, Port Elizabeth and the various estuaries running several miles to the west were also considered a part of the Port. When the negotiations on the Rules were under way in 1968-1969 the term "fifty-miles from Columbus Circle" had already been used and re-used in the resolution of grievances and labor disputes. The significance of the term was an understanding that there had to be some reasonable geographical limit easily understood by the shipping public, within which cargo had to be brought to or delivered from the piers. There can be no question today that all of the shipping public, without exception, knows full well the meaning and significance of the term "the fifty-mile rule".

When the 1968 negotiations were completed the industry did not accept the Rules on Containers without continuing attempts to evade or avoid the Rules to the extent possible. As is known, litigation developed early, witness the Second Circuit decision in ITCT in 1970, and

the refusal of the General Counsel and Regional Director to issue complaints against the Rules in 1970. From then until 1973 the disagreements with the ILA were not as to the substantive Rules themselves, but as to whether or not carriers were living up to their agreement. While I would say that the executives of USL issued instructions that the Rules should be considered as a valid labor contract, in many cases it was brought to my attention that certain subordinate employees did seek to avoid the Rules in order to be able to satisfy various customers.

Nevertheless, the policy of USL was to live within the Rules from the beginning. The record in the Houff case, both before Judge Merhige in the United States Eastern District Court for Eastern District of Virginia, and before Judge Wagman in the secondary boycott and hot cargo proceeding, clearly indicates the instructions received by the USL employees in both Hampton Roads and Baltimore:

(a) USL was bound by the Rules on Containers;

(b) Any entity having an interchange agreement with USL which attempted to make USL violate the Rules would have the interchange agreement immediately cancelled;

USL cancelled the interchange agreement of Houff and Associated Transport for these reasons and neither of them were able to enter into such an agreement again for several years.

The above are only examples on record as to the position taken by USL. Our Port Managers in both Baltimore and Hampton Roads have testified that these two instances were only two of many. Similar action was taken in any port where similar conduct took place.

The significance of the above-mentioned cancellation of Interchange Agreements and the maintaining of such position for periods, not of months, but of years, indicates the extent of the control exercised by USL over its containers.

The complaints of the ILA with respect to the failure of the steamship carriers to properly live up to the commitment as set forth in the Rules on Containers led to the Dublin Rules. The meaning, the purpose of the Rules and the background are fully set forth in the various NLRB proceedings and need not be repeated here. However, it should be emphasized that these Dublin Rules did not correct or in any substantive way change the Rules on Containers, except with respect to the warehouse exception and, in that area, the Dublin Rule softened the impact of the Rules, especially in ports such as Hampton Roads and Baltimore. The real importance of the Dublin Rules was that they resulted in greater enforcement thereof to such an extent that the consolidators who were formerly able to avoid the Rules by false documentation and other similar devices were no longer able to deliver their cargo in full container loads because the steamship carriers who exercised full control over the containers would not give them empty containers for stuffing. As to the warehouse exception from 1969 through 1973 all cargo destined for warehouses, especially in the ports of Baltimore and Hampton Roads would have to be stripped at the piers before it could be delivered. It was the steamship carriers who induced the ILA to permit the development of the thirty-day warehouse rule in order to protect bona fide warehouses and to permit the containerization concept to be extended to the warehouse industry.

It must also be pointed out that the ILA in the Port of New York had permitted an informal warehouse exception to develop in that port, and full container loads were delivered without being stripped if the cargo was to be actually warehoused for a substantial period of time. The litigation which followed the Dublin Rules is fully set forth in both the Supreme Court decision and in the decision of the Court of Appeals for the District of Columbia. It should be emphasized that the period 1973 through 1980 was a time of strike and strife and unending difficulty with the ILA.

As President of USL, I witnessed two costly strikes in 1976 and 1977, which the ILA selectively aimed against the carriers. These strikes cost USL tens of millions of dollars. It is also important to note that the negotiations of 1974 resulted in no strike, because at that time Administrative Law Judge Arnold Ordman had found the Rules on Containers to be valid work preservation rules, and the ILA expected that the NLRB would adopt his findings.

When the history of the many strikes on this issue from 1957 through 1977 is reviewed, it requires no great perception or clairvoyance to forecast the result of contract re-openings which must inevitably take place if the Rules cannot be implemented.

The Rules were intended to protect a small part of the work traditionally performed by longshoremen on the piers; they were negotiated, and through costly and disruptive strikes were obtained from reluctant employers who always had the full right to control and assign such work to the longshoremen. The industry has negotiated on the work preservation issue in good faith; its judgment should be accepted by the General Counsel and it should not be required to bear the brunt of another decade of labor unrest and instability.

/s/ Edward J. Heine, Jr.
EDWARD J. HEINE, JR.

AFFIDAVIT

STATE OF NEW JERSEY

COUNTY OF BERGEN

I, Hubert Wiesenmaier, having been duly sworn state under oath as follows:

I am an International Transport Consultant with offices at 110 Green Street, New York, New York. After finishing college in Germany I was selected to participate in a fellowship program at the University of Cincinati. In 1965, I joined the International Division of REA Express in New York, which provided international freight forwarding, customer house brokerage, and so-called NVOCC services to importers and exporters. Terminals operated by REA Express for the processing, consolidation and containerization of shipments were located in every major seaport of the United States. In 1968, I became International Regional Manager of REA Express in San Francisco, and was responsible for our services at the major West Coast ports, Seattle, San Francisco/Oakland and Los Angeles/Long Beach. At the end of 1969, I left REA to become a partner in a transportation consulting firm, with offices in New York and San Francisco. Our clients included exporters, importers, importers' associations, trucking companies, warehousing operators, NVOCC's as well as ocean carriers. In 1978, I returned to New York where I became the transportation consultant for a major footwear import association, the American Importer's Association, and a number of import and export trading firms. I issue regular transportation reports, which inform importers about ongoing developments in the transportation field. Last year, I participated in preparing testimony and testified in hearings before Congress concerning the Omnibus Maritime Bill, and the 1980 Shipping Reform Act.

In this statement I am going to describe the impact that intermodal transportation has had on the traditional work of longshoremen. I should note in this regard that I was fortunate to have been in New York—the container capital of the world—during the years when containerization emerged as the new major international transportation system; and I had the opportunity to participate in the early formulation and implementation of intermodal consolidation and container shipping programs.

Before I get into a discussion of intermodal transportation, I feel it is pertinent to define a few related terms commonly used in the shipping industry:

Definition of Terms:

Unitization:

The consolidation of a number of individual items into one large shipping unit for easier handling. It is also the securing or loading of one or more (large) items of cargo onto a single structure, such as a pallet.

Containerization:

Is the act of using containers for the transportation of general commodities. In a narrower sense, it is the placing of the commodities in the container in a secure manner, and the eventual removal of said commodities in an orderly manner at final destination.

Container:

Basic Definition: An enclosed, permanent, reusable nondisposable weathertight shipping conveyance. Fitted with at least one door, and capable of being handled and transported by existing (carrier-owned) equipment, both land and sea.

Container Service:

Containers are not an end in themselves but only a means to an end, namely the safe and economical trans-

port of cargo from the point of origin to final destination. The degree of container service provided or required will depend upon a number of considerations. The following types of container services are usually available:

Pier-to-Pier (CFS-CFS): Ocean carrier containerizes shipper's cargo on the loading pier, and removes cargo from the container on the arriving pier.

Pier-To-House (CFS-CY): Cargo is containerized on the loading pier of the ocean carrier. Upon termination of the movement, the container is moved off the arriving pier and delivered directly to the consignee's factory or warehouse for removal of the shipment.

House-to-Pier (CY-CFS): Shipment is containerized at the shipper's factory or warehouse, and moved overland to the ocean carrier's pier for ship loading. Upon terminating of the ocean movement, the shipment is removed from the container at the arriving pier prior to its delivery to the consignee.

House-to-House (CY-CY): Shipment is containerized at shipper's factory or warehouse and moved overland to the ocean carrier's pier for ship loading. Upon termination of the ocean movement, the container is moved off the arriving pier and delivered to the consignee's factory or warehouse for removal of the shipment from the container.

CFS (Container Freight Station): The location designated by the ocean carrier for the receiving and delivery by carrier or his authorized agent of goods to be or which have been moved in containers.

CY (Container Yard): The location designated by the ocean carrier in the port area, where the ocean carrier holds or stores containers and where containers loaded with goods are received or delivered.

Stuffing: The loading of goods into a container. Does not include loading onto a truck, rail car, or any other conveyance.

Stripping: The unloading of goods from a container. Does not include the unloading from truck, rail car, or any other conveyance.

Chassis: A wheel assembly including bogies constructed to allow the overland movement of containers.

Full Containership: All cargo spaces are fitted with vertical cells for container storage. Additional containers are carried on deck.

Ro-Ro Ship (also called Trailer Ship): Loads and discharges vehicles in the same manner as a ferry boat carrying automobiles and trucks. The term roll-on, roll-off describes this very principle of loading and discharging the vessel. A Ro-Ro ship carrier containers (as well as highway trailers and other vehicles) on their own wheels/chassis.

Physical Distribution: It is the coordination of the movement of goods from the raw material state to the finished product state. Generally speaking it is the movement of raw, semi-finished or finished materials into the manufacturing, the intra-plant movement of such materials, and includes the warehousing, shipping and delivery of the finished product to the local distribution terminal, or the retailer's shelf.

Intermodal Coordinated Transport: This is normally used to describe the capability of interchange of container units among the various modes of transport. The fact that the cargo containers are of the same size in height and width, and have common handling characteristics, permits them to be transferred from trucker, to railroad, to ocean carrier, in origin-to-destination movement, without the contents of the container being touched.

NVOCC (Non-Vessel-Operating Common Carriers): Means a common carrier by water that does not operate the vessel by which its ocean transportation service is provided. A NVOCC is a shipper in his relationship with

vessel operating common carriers by water. The NVOCC must file its tariff with the Federal Maritime Commission.

Consolidator: Means a warehousing operator usually engaged in general transportation or freight forwarding services which receives less than container load shipments and places them into carrier owned containers.

LCL: It stands for Less than Container Load. Containers holding goods belonging to more than one shipper or consignee are called consolidated container loads. Such cargo is also called less than trailer load cargo (LTL).

FCL: (Means full container loads). Containers holding goods owned or controlled by one shipper or consignee.

Development of the International Intermodal Transportation System

During every phase in the history of international commerce, concepts of cargo unitization were developed by shippers and carriers to facilitate the economical, safe, and speedy transportation of goods. Traders used traditionally wooden boxes, barrels and any other custom-made containers for shipping on land or on the seas. The dimensions and weight capacities of these shipping units were usually limited by the type of handling equipment that was available at the various stages of the journey. As mechanized cargo handling systems advanced larger shipping units were developed, and could be handled efficiently with less manpower. High technology cargo handling equipment was eventualy installed on vessels, as well as at the piers and at other cargo transfer points. The cargo container as we know it today is but one of the mentioned shipping units that evolved—although it is quite clear that the impact of container technology was particularly significant to transportation philosophy, and therefore the cargo handling and shipping industry. The time period during which containerization changed international shipping methods in any significant way can be

placed between 1965 and 1968. By the end of 1968 more than 50% of U.S. imports, and at least around the same percentage of general commodities exports were containerized at off pier facilities.

During this time period while working for REA Express, I was involved in some of the very early consolidation and containerization programs for major U.S. importers. Typically, if an importer had a large number of overseas suppliers he would instruct those suppliers to deliver his orders to a designated (off-dock) consolidation point abroad. The consolidator would stuff containers in a preplanned manner, *i.e.*, by port of unloading, or by distribution warehouse, or by retail store. After unloading at arrival port, containers would be delivered by the ocean carrier at the container yard. The consignee would determine whether the container should then be moved directly to a final destination/distribution point, or should be brought into an off-pier facility for temporary warehousing and/or distribution to stores or warehouses. The described type of physical distribution program met the importer's requirements to merge overseas delivery, ocean transportation and state-side handling and delivery of his goods into an overall cargo distribution plan. It assured him of accurate and timely information about goods in transit, and allowed him to exercise full control over the routing and the mixing and matching of shipments to meet market needs. The contents of containers was handled neither at the overseas port of loading, nor by longshoremen at the U.S. port of discharge; this would have served no purpose whatsoever, and would have severely hampered the shipper's transportation and distribution management.

Conversely, a significant amount of export shipments were containerized by U.S. shippers at their factories or warehouses located either inside or outside the port area. Shipments originating at various points were collected at a consolidation station and containerized into full container-loads there. At the same time shippers of LCL

cargo availed themselves of intermodal container services that are offered by consolidators/NVOCC's. These consolidated container shipments moved over the pier into the vessel without handling of its contents at the pier by longshoremen.

Shipper's Control of Transportation Services

Shippers have the undisputed right to designate the ocean carrier which will handle the movement of their goods. This designation is usually made by the party who pays the ocean freight. The shipper also decides which type of container service best meets his needs, i.e., CFS-CFS (Pier-to-Pier), or CY-CY (House-to-House) services, or a combination thereof. Service details, rates and charges, and conditions for transportation are contained in the ocean carrier's tariffs and its Ocean Bill of Lading, which is part of the tariff. Ocean carriers must closely adhere to all rules and conditions of their tariff, and are regulated by the Federal Maritime Commission. The shipper that selects to move his containerized cargoes in House-to-House (CY-CY) services will be issued an Ocean Bill of Lading that indicates the receipt by the ocean carrier of a container, "said by shipper to contain (certain quantity of certain commodities), shipper's weight, load, and count." In other words, there is an express acknowledgement by the ocean carrier for the receipt of the shipping unit only, and the acknowledgement to deliver the same shipping unit at destination. The concept of the container being considered a shipping unit is further evidenced through the fact that the carriers liability for shipper loaded containers is drastically limited. The description of the contents, the piece count, as well as the stowage of the container contents was declared by ocean carriers to be the shipper's responsibility. Under CY-CY service conditions ocean carriers have no control over the handling of the container's contents.

Ocean carrier tariff provisions state that the place of delivery for (CY-CY) House-to-House containers shall

be the carrier's designated container yard, and that consignees are required to take delivery at the container yard at the discharge port and to move the loaded container from the container yard at consignee's risk and expense.

Containers will not be stripped or stuffed by longshoremen labor unless the shipper chooses to contract for CFS/Pier services with the Ocean Carrier pursuant to the latters tariffs. (Attached to this Affidavit are relevant portions of Tariff FMC-13 of the Continental North Atlantic Westbound Freight Conference, and Tariff FMC-41 of The North Atlantic Westbound Freight Association. They are representative of container service tariffs in major trade routes from and to Europe.)

Integrated Nature of Services Provided by Firms Offering Intermodal Container Services

These considerations therefore center not solely on cost, but also encompasses service speed, the prevention of loss and damage, and the system's overall capability to deliver goods at a pre-planned time. I would like to examine the mentioned areas more closely.

As stated earlier, the combination movement of a container by different modes of transportation, i.e. by vessel, by truck and by rail, constitutes an intermodal container movement. Inherent features of an intermodal container movement deal with the packaging of goods, the methods and reduced risks of handling, the flexibility in exchanging containers easily between modes of transportation, and the advantage of flexible routing of the freight.

Traffic Control and Service Predictability

In a finely tuned integrated transportation system the flow of traffic can be closely controlled. Shipments consigned for overseas designations are received and warehoused at a consolidator's/NVOCC's off dock facility to be mixed and matched in accordance with the shipper's

instructions. Specific orders can be assembled from inventory and consolidated into full container loads for specified overseas distribution points. A typical pier stuffing and unstuffing operation could not meet any of these requirements, since pier facilities are usually not set up to respond to the specific physical distribution requirements of individual shippers. Most pier facilities do not provide for sufficient warehousing space that can accommodate inventories of shippers with varying warehousing requirements, in contrast to the tailormade warehousing arrangements provided by off dock facilities. I am also unaware that at the piers inventory control systems are in place which would assure shippers accurate and timely receiving, inventory, and shipping reports. Without the capability to accumulate inventories, to mix and match orders for shipping and to manage cargo flow and inventories efficiently, the control of traffic provided by intermodal coordinated transport system would be lost entirely.

The same principles apply of course also to import traffic. The off-dock distribution warehouse is a major station in the intermodal transportation chain. At the distribution warehouse shipments from different overseas suppliers and/or countries are received. Inventories are promptly reported to the consigner and orders can be picked from the available inventory and consolidated for shipment to the retailer's shelf or any other ultimate designation point. Again the receiving of shipments discharged at various piers and their accumulation at one on pier facility would be impossible or at least extremely impracticable due to the lack of space on the pier. Additionally, it would be highly unlikely that one ocean carrier or terminal operator would provide sufficient warehousing or cargo assembly space to facilitate shipments that arrive via a number of sometimes competing ocean carriers.

As demonstrated above, the ocean carrier industry represents but one important link within the integrated transportation system. It is obviously not its inherent

responsibility—nor are ocean carriers and pier operators in a position to provide a full range of transportation and distribution functions that are so closely linked with container transportation.

Cargo Handling and Productivity Improvements Are Determined by the Shipping Unit

It is a common truth that with proper technology, larger lots of freight can be handled speedier, more economically, and safer than equal tonnage of small lots. This recognition led to the development of unitized shipping and containerized shipping. There is little question, therefore, that the combining of freight into larger shipping unit (pallets, bundles, containers) greatly improve cargo handling productivity at the pier and drastically reduces the risks for loss or damage to the cargo.

A reduction in the handling phases during transportation will normally lead to redesigned cargo packaging and reduced packaging costs. For example, containerized consumer products are today almost always shipped in so-called domestic packaging. Additional handling of the container contents at the pier would require a changing back to heavier, more expensive, and wasteful "export packaging." Instead of handling one shipping unit—"a container"—at the pier longshore labor would revert back to handling the many individual packages that are contained in the container. Obviously, the time necessary to handle this greatly expanded loose cargo volume would leave the most detrimental impact on the intermodal transportation system.

Impact of Containerization on the Traditional Work of Longshoremen

As in any other industry that has experienced rapidly changing technology: intermodal container operations had a significant impact on services provided by longshoremen labor at the piers. Before mechanized cargo handling and

container systems were developed, longshoremen use to handle individual pieces of freight in and out of the vessel holds, and in and around the pier's transit shed. On import cargo, the longshoremen would sling individual pieces or groups of shipping units in the holds of the ship, move the cargo to the square of the hatch, and out of the vessel's hold to a place of rest at the pier facility for loading onto a truck or rail car. Reverse process was true for export cargo. Sometimes longshoremen would load or unload the truck at the pier facility. Longshoremen are still performing the above-described traditional work for so called break bulk shipments. In addition, longshoremen stuff and strip containers at the pier if cargo has been designated for such handling by the shipper.

The need of shippers to include the ocean transportation phase into their overall physical distribution plan resulted in what is commonly described as intermodal container system. The container became the indispensable technology for both the intermodal ocean carrier as well as the cargo owner. This new transportation technology caused the re-definition of what constitutes a shipping unit which had a direct influence on the type of shipping unit longshoremen would handle at piers. In this respect ocean carrier service descriptions, tariffs, and Bill of Lading stipulations very clearly identify the container as the shipping unit in contrast to so-called loose cargo, or break bulk, or unitized lots. Even today a number of shippers choose to deliver, or to receive their shipments at the ocean carrier's pier facility in so-called pier-to-pier (CFS-CFS) services. These shipments still are handled by longshore labor. However, as seen above in an intermodal transportation system, containers are utilized in a fashion that results in the movement of containers without handling of its contents by longshoremen. Shippers usually require this intact through-movement of their containers to designated distribution facilities because a number of cargo mixing and matching functions as described above have been instituted there to which the

unloading or loading of the container is quite incidental. The function of the longshoremen to facilitate the ocean carrier's services is the handling of the shipping unit (container) out of the vessel's hold and across the pier to the point where the consignee takes delivery. The technological progress in cargo handling, and the resulting redefinition of the shipping unit in ocean shipping has resulted in the development of expanded physical distribution concepts that merged container loading or unloading with a host of other distribution functions. The traditional work of the longshoremen has consequently been modified to handling containers as shipping units across the pier, while still continuing the traditional methods of handling loose cargo. The stripping and stuffing of intermodal containers, however, has been merged into the broader concept of a fully coordinated intermodal movement of goods, and can no longer be clearly identified as a distinguishable work function at the pier.

I have read the above ten (10 pages) and swear that they are true to the best of my knowledge and belief.

/s/ Hubert Wiesenmaier
HUBERT WIESENMAIER

OFFICIAL REPORT OF PROCEEDINGS
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Docket No. 5-CC-791, et al.

IN THE MATTER OF:

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION
AFL-CIO, ET AL.

-and-

ASSOCIATED TRANSPORT, INC., ET AL.

Place: Norfolk, Virginia

Date: Wednesday, October 15, 1975
Thursday, October 16, 1975
Friday, October 17, 1975
Wednesday, October 22, 1975
Thursday, October 23, 1975
Friday, October 24, 1975

EXCERPTS OF RECORD IN
ASSOCIATED TRANSPORT

[65] WITNESS JACK W. MACE

* * * *

Q (By Mr. Rosenstein) Mr. Mace, where are you employed, please?

A Executive secretary of the Hampton Roads Shipping Association.

Q And how long have you served in that capacity?

A Since the Hampton Roads Shipping Association was organized in 1971.

* * * *

[106] Q (By Mr. Lambos) Mr. Mace, would you please tell the Court in your own words what the practice was before the Dublin rules with respect to a container destined to go to a warehouse within the port of Hampton Roads?

A If such container did not go to a consignee's facility within a 50-mile radius—a beneficial owner's facility within a 50-mile radius, then, it was termed a stripper. It had to be stripped.

[107] But if the container was destined to go to the beneficial owner's facility within a 50-mile radius, then, it was not a stripper. It did not have to be stripped.

But if the container were to go to a consolidator or a broker or a forwarder's facility or what-have-you, then, the container had to be stripped at the pier by ILA labor.

Q Do you know of any exception to what you have just testified to from the inception of the rules?

A No exceptions prior to the Dublin rules.

Q Now, what exception did the Dublin rules make with respect to shippers loads?

A Dublin rules brought in the 30-day warehouse rule applicable only to import cargo, and that said, cargo in its normal course of business may be sent to a public

warehouse, stay there for a minimum of 30 days and exempt from stripping by ILA labor at the pier.

* * * *

[115] Q (By Mr. Lambos) Mr. Mace, the Hampton Roads Shipping Association is one of the constituent members of CONASA, is it not?

A That is correct.

Q And you as executive secretary of the Hampton Roads Shipping Association attend the various meetings of CONASA?

A I have attended all of the meetings except one, yes.

Q You have also attended meetings of the CONASA-ILA Container Committee, which is provided for by the rules on containers?

A That is correct.

Q Have you so attended from the beginning of the formation of CONASA in 1971 to the present time?

A I have.

* * * *

[152] MR. AUTEN: Your Honor, Mr. Lambos's last point is addressed to the 1974 contract?

MR. LAMBOS: And the 1968 contract and the 1971 contract.

MR. AUTEN: Do they all contain this provision?

MR. LAMBOS: No. What you will see is that improper documentation has always been wrong. '68 said it very straightforwardly; in '71 it said it straightforwardly; and in '74, they beefed it up so that they would require a little more from us. Some of that came out of Dublin in 1973. So you will—We will show you in our case how these rules evolved and why we have had to have changes because of these evasions by truckers and others.

* * * *

[153] rules. I'm not talking about who should do it. I'm not talking about who may be in violation of the rules. I want to know if anyone other than these motor carriers

stripped full container loads destined to a single consignee.

A I'm sure that the ILA from time to time has stripped a full container load.

Q Do you know that as a fact?

A If they were ordered to do so, yes.

Q Now, why would they have done so, sir?

A Well, for any number of reasons. The option of the consignee. Maybe the goods were going to Georgia and he found a local consumer for the goods and he wanted the goods stripped at the pier for local distribution rather than distribution in Georgia.

* * * *

[167] WITNESS CLETUS E. HOUFF

* * * *

Q And where are you employed, sir?

A At Houff Transfer, with headquarters in that city.

Q And what is your capacity?

A President.

Q And what is the business of Houff Transfer?

A Common carrier.

* * * *

[169] Q Would you describe how you utilize a container?

A We pick the containers up from the piers, take them to our terminals, weigh them; and, if they are overweight, they are transferred to the trailers of Houff Transfer. In some cases, they may not be overweight and also be transferred to the trailers of Houff Transfer.

Q Okay. Now, let's go back and will you define for me what an LCL load is, please?

A An LCL load is a less than—We term it LTL, less than truckload; and I guess an LCL is less than container load. It means it's a shipment that will not fill the entire vehicle in which it is loaded on.

Q Now, are you familiar with the term, shippers load?

A Yes.

Q Would you describe what a shippers load is, please?

A A shippers load is a load that is loaded on a container or trailer by the shipper and tendered to some carrier for transportation.

Q What are the size of the containers that you would pick up at the pier?

A 20-foot and 40-foot lengths. Some 35's, but mostly 20- and 40-foot.

* * * *

[173] Q And will you describe how motor transport carriers like Houff would utilize the bill of lading?

A A bill of loading is issued by the shipper covering whatever shipment he may be shipping at the time, and it is a document by which the shipment is received; and, from this bill of lading, a freight bill is made by Houff Transfer providing essentially the same information that is covered on the bill of lading.

* * * *

Q (By Mr. Rosenstein) Now, I direct your attention to the Baltimore port area, and I ask you when did containerization begin.

A It began, to my knowledge, around 1965.

Q That's in the Baltimore area?

A In the Baltimore area.

Q Now, you have already defined a full shippers load. I want you to tell me in 1965 what Houff Transfer did when they [174] picked up a full shippers load at the pier area in Baltimore.

A We were requested by either an agent of Baltimore or perhaps a consignee itself to go to pier so-and-so and contact whatever steamship the company may have the container and pick up the same and deliver it—deliver the merchandise to the consignee.

Q Now, what is the distance in miles from the pier area that most of your shipments are destined?

A It would range from a minimum of 150 miles to a maximum of 450 miles.

Q When you picked up a full shippers load at the pier, was the seal intact?

A In most cases.

Q Had the full shippers loads been stripped by deepsea ILA labor at the pier?

A No.

Q Directing your attention to the Norfolk area, when did containerization commence?

A At about the same time, as I recollect.

Q Will you describe, in the Norfolk area, how you picked up a full shippers load at the pier area?

A In the Norfolk area, the brokers would issue the instructions. In some cases,—and I'm talking about 1965 —we would be directed by the consignee to contact whatever broker may be handling the shipment. And once the contact [175] was made, you may have had a document to carry to the pier or it may have been done by a telephone conversation, to go to the pier and get container so-and-so; and there the documents would be issued to you at the pier.

Q Now, when you picked up a container of a full shippers load at the pier in Norfolk, was the seal intact?

A In the majority of the cases.

Q All right. Would you describe for me when the seal would not be intact?

A Occasionally, the seal may be broken by customs; and, on some occasions, it may have gotten broken in transit. It is a policy to check the seal numbers before the containers were picked up.

Q Were containers of full shippers loads in 1965 stripped at the pier by deepsea ILA labor?

A No.

Q Now, let's go to the year 1966 for both Baltimore and Norfolk. Was the procedure the same as you described for 1965?

A Yes.

Q Were the containers stripped at the pier by deepsea ILA labor?

A No.
Q And you're talking about full shippers loads?
A Correct.
Q In 1957, in Baltimore and Norfolk, were the containers [176] stripped at the pier—full shipper load containers by deepsea ILA labor?
A No.
Q In 1968, for both Baltimore and Norfolk, were the containers stripped at the pier—full shippers loads—by deepsea ILA labor?
A No.
Q In 1969, the same question.
A No.
Q In 1970?
A No.
Q 1971?
A No.
Q 1972
A No.
Q 1973?
A No.
Q 1974
A No.
Q 1975?
A No.
Q Is there any method in which a consignee—and that's the beneficial owner—can require a container to go through intact to the final destination?
A Yes.
[177] Q How?
A By requesting exclusive use of the equipment.
Q What is exclusive use of equipment?
A It means equipment will move through with whatever merchandise that may be on it without anything being added on to it and it must be expedited. In other words, once you receive it, it must keep moving.
Q From 1965 to the present date, has Houff Transfer ever had exclusive use of equipment requested?

A Certainly not over two or three times, if ever. I recall one shipment that may have been a container. I'm not real sure; but it's very rare that that situation, because there is a penalty assessed to the consignee and higher transportation costs.
Q Directng your attention to February 19, 1974, I ask you whether or not you picked up some containers on that date.
A Yes.
Q Where did you pick them up and what containers did you pick up?
A I picked them up from the Dundalk Marine Terminals from United States Lines destined to—
Q How many containers?
A Two.
Q Did you pick up any other containers?
A I'm not sure, on that particular date.
[178] Q Did you pick up any containers from Lavino Shipping?
A Yes.
Q Was that in that same general time frame?
A Yes.
Q What type of containers were these three containers which you picked up at the pier area?
A 20-foot containers.
Q And what kind of loads did they contain?
A Two containers from United States Lines contained silicone with the total weight of 78,000 pounds on the two containers. The container from Lavino was drums of picoline with the weight of about 38,000 pounds, 80 drums.
Q Were these containers described as full shippers loads?
A Yes.
Q All right. What did you do from the point that the broker told you that you were going to pick up these containers, that you had been designated as the carrier?
A Picked the containers up from the steamship com-

panies, took them to the Baltimore terminal, transferred them to Houff trailers.

Q What specific reasons did you use to open the seal and strip those containers?

A The number one reason was they were overweight; they couldn't be legally pulled over the highways of Virginia and West Virginia.

[179] The number two reason is—

* * * *

Q (By Mr. Rosenstein) I show you what has been marked for identification as General Counsel's Exhibit Number 17 and ask you if you can identify what that is.

A Those are the weight laws applicable in the State of Virginia.

Q Now, do you want to explain those weight laws in relationship to the containers that you picked up at the Baltimore pier area and stripped at your terminal?

A The containers which we picked up in Baltimore were all three 20-foot containers; and they show the distance between the first and rear axle and the maximum weight allowed under these allocations.

Q So what determination did you make with respect to that chart on the three containers which you picked up?

A That they were all overweight.

Q And, therefore, what did you do?

A We unloaded them and transferred them to Houff trailers.

Q And is this to comply with the State of Virginia's rules and regulations on motor transport?

A Yes.

* * * *

[182] Q (By Mr. Rosenstein) Now, you said the first reason was as a result of the distribution of load for stripping a container. Would you continue and tell me if there were any other reasons that you determined it necessary to strip the three containers?

A The second reason was that, being a 20-foot trailer or 20-foot container loaded to the roof, going through the

mountains of West Virginia, it's a very unsafe operation, particularly in the wintertime. U.S. Highway 60, which is the highway that Alloy is located on, is one of the most obsolete and mountainous roads in the Continental United States.

The third reason is that when we unloaded the container and we turned it back to the steamship lines, we saved the rental cost of the container.

[183] Q Now, the rental cost, is that under your equipment interchange agreement which was introduced as General Counsel's Exhibit 15?

A It is.

Q And do you pay the steamship line for the use of those containers?

A Yes.

Q Those containers are owned by whom?

A They pay the steamship lines for them. Some of them own them and some of them lease them from the container people.

Q Houff does not own the container that you pick up at the pier?

A Under no conditions.

* * * *

[187] Q I show you what has been marked as General Counsel's Exhibit 15, the equipment interchange agreement. I ask you if there is anything in the equipment interchange agreement between Houff and U.S. Lines that precludes you from stripping a full shippers load at your facility?

A No.

Q Mr. Houff, are there any other documents which you utilize to pick up a full shipper load at the pier area?

A No.

Q So the bill of lading and the equipment interchange agreement and the delivery order are the documents that you utilize?

A That's correct.

Q Is there any other document that you have knowledge of that specifically precludes you to strip full shippers loads at your facility?

A Not to my knowledge.

* * * *

[188] Q (By Mr. Auten) Mr. Houff, in your testimony, you went into reasons why you might strip containers containing full shippers loads going to a single consignee. As I recall, [189] three of them, the weight rules imposed by the states was the first; the second was safety reasons in addition to the weight rules; and the third was the economy, specifically having to do with the rental charge, which was charged by the shipping company.

Now, in addition to those reasons, are there any other operational factors that might suggest to you that a container be stripped?

A Yes. On some containers, the fifth wheel pin located on the chassis will not prevent or will not permit the use of a tandem axle tractor in the movement of that container. In other words, the rear wheels will hit the chassis and, therefore, you are not able to use a tandem axle tractor. If you did move the 20-foot container, there's always the problem of trying the load the thing back, because you only have half the amount of floor space in that that you would have in regular—or less than half the floor space that you would have in regular common carrier equipment, or the equipment of Houff Transfer.

If you are not able to load it back and it has to sit around for days or weeks, it's costing money. Again, it comes back to the cost of the—

Q Just for purposes of clarity, describe what you mean by loading back.

A In other words, if it would be be pulled to the consignee's [190] destination—and we will use Alloy, West Virginia as an example—and then get that equipment loaded back into the Baltimore area, it's practically impossible to get a pay load on it. In other words, even if

you did load it, it would move for about half of the revenue that should have been on it; and if you only move it for about half of the revenue, then, it's a losing proposition.

* * * *

[203] Q Now, could you tell us, on the basis of General Counsel's Exhibit 17, what weights you found to prohibit the movement of these two containers to West Virginia?

A The distance in feet between the extreme of any group of axles—which means the front axle and the rear axle—that distance was in the range of 25 feet, which allowed a gross weight, including the equipment, of 53,000 pounds. The tractor itself, a tandem axle tractor weighs approximately 16,000 pounds. The container and the chassis will vary. It varies anywhere from ten to twelve thousand pounds, depending on the type chassis. So you add the weight of the tractor, 16,000, and we will assume 10,0000 for the container, which is 26,000 and then add—well, if you split it in half, it would be 39,000 pounds—and add those two together, and that would give you a gross weight of 60-couple thousand [204] pounds.

Q Which is over the limit of 53,000 pounds?

A Right.

Q But so is the movement made on Trailer 645, is it not?

A It is not. Because on Trailer 645, your distance goes up to some 40-feet between your front axle and your rear axle.

Q Well, if I added 41,000 pounds to some 26,000 pounds, how much would that be?

A It would be 67,000 pounds.

Q And what was your distance in feet between the extremes of the axles be?

A It would be 40-couple feet, depending on where you set your rear wheels at.

Q And that would be about as heavy a load that you could get, is it not?

A You could add another 5,000 pounds and it would still be legal.

Q How about this trailer? (indicating).

A The same thing.

Q Well, this 78,810 is the contents of these two containers, isn't it?

A That's correct.

Q And could you tell us what the weight load the Trailer 407 carried?

[205] A The weight load of the calcium silicium was 37,390 pounds; and I am sure that we had another five or six thousand pounds of miscellaneous freight on the rear of this trailer, bringing it on up into the 40,000 pound pay load, because that's the figure that we strive to load on the trailers going into West Virginia.

* * * *

[213] Q In Norfolk, you indicated that you have five employees.

A Right.

Q Could you tell us how many of those employees are supervisory and how many actually perform loading or unloading of container work?

A One supervisor has to do the loading and unloading.

Q Do any of these remaining four employees perform office work?

A One may do a little on occasion; but his primary function is to load and unload. In addition to that, we fill in with over-the-road men, helping them to do loading and unloading.

Q How many manhours does it take to load a container? In other words, take the cargo out of the 20-foot steamship box and put it into one of your own boxes.

A From a half to an hour.

Q From a half an hour to an hour?

A Right.

Q With how many individuals working?

A One.

Q One individual?

A Right.

* * * *

[230] Q And have you served in every negotiation since 1954 to the present time?

A Yes, I have.

Q Now, first, I would like to get to what's just been asked you; and I will go into the contract here. You were asked whether or not on full shippers loads the ILA stripped full shippers loads on a house to house status; and I think you stated that the ILA did not.

A Right.

Q Right. Now, when does the container cease to have the house to house status—or a full shippers load cease to have the house to house status under the contract—or when would the ILA be entitled to strip this load?

A When a full shippers load does not go to the beneficial owner or consignee of the cargo at his own installation and is off-loaded by his own employees, then, it loses its identity as a full shippers load.

* * * *

[235] WITNESS OTIS LANDIS

* * * *

Q (By Mr. Rosenstein) Mr. Landis, would you give your name and address for the record, please?

A 5718 Bartee Street, Norfolk, Virginia.

Q Where are you employed?

A Teamsters Local Union 822.

Q And do you hold a position in that organization?

A Secretary-treasurer.

Q And how long have you held that position?

A Approximately two years.

Q Prior to holding that position, what type of employment were you involved in?

A Truck driver.

Q And for whom did you drive a truck?

A Hemingway Freight Lines, Hennis Freight Lines, Preston Trucking Company; quite a few.

* * * *

[238] Q Now, have you ever observed containers being stripped at motor transport carriers that contained full shippers loads?

A Well, I have observed containers being stripped. As far as whether it was a full shippers load or not, I really couldn't tell you.

Q Do you know or have knowledge whether Teamster employees of the aforementioned companies you have described when the need arises have stripped full shipper load containers?

A Yes.

Q All right. And they would be stripped where?

A If the trucking strips, it is done at his terminal.

Q Now, will you tell me the reasons that a trucker, when the need arises, would strip a full shippers load by Teamster employees?

A Well, there would be numerous reasons. One of them would be—It's primarily 20-footers, which they are a very cumbersome trailer for a freight company to try to operate with. They are small. And I think there was some testimony before about the bridge law as opposed to weight limits. You can take two 20-footers. If both of them would have, say, in excess of 45,000 pounds between the two of them, you can consolidate them into one trailer, one 40-or 45-footer freight trailer and take it where it's going, deliver it. Then, [239] you've got a trailer there and they can reload back.

Q Okay. Are there any other reasons that motor transport carriers would strip a container?

A Well, from my experience as a driver and as a business agent, now, in getting complaints from the drivers about containers, they tell me that they are hard to pull, they handle bad, the tires may not be maintained at what they think are proper standards, they have a lot of light problems with them.

And on the 20-footers, with the twin-screw tractor, the three-axle tractor, you do have the problem of the rear tires getting into the landing gear and the chasis frames.

Q Would you explain that?

A Well, when the tractor turns, the trailer—the landing gear, the stand that it stands on when it's not being pulled, these are right up against the back of the tractor; and when you turn, they dig into the tires.

Q How long have Teamster employees been stripping full shipper loads at the employer members of Tidewater?

A I have seen containers stripped and loaded in and out of Norfolk since they have been running containers.

Q Do you recall the approximate year when that first started?

A Oh, some of them were pulling them in the middle-'60s.

Q Now, is there any way, to your knowledge, that a [240] consignee can require a 20-foot container to go intact to the manifested destination?

A Where the consignee would require it?

Q Consignee, broker—

A Shipper or whatever?

Q Right.

A The only thing I could come up with right off would be on an exclusive use basis.

Q What's exclusive use mean?

A That's where the shipper or receiver, one or the other—whoever is paying the freight—pays a premium for—he gets exclusive use of the trailer. Exactly what it says.

Q I show you what has been introduced into evidence as General Counsel's Exhibit 18 and ask you whether you have even seen a document similar to that.

A I've seen documents similar, yes.

Q All right. And what is that document?

A It's a delivery order, a pickup order for what appears to be a container or two containers.

Q From your experience in dealing with delivery orders, is there anything on that delivery order which precludes the motor transport carrier from stripping a full shippers load?

A I see nothing that would preclude it.

* * * *

[291] WITNESS JOHN EVERETT

* * * *

[292] Q And where are you employed, sir?

A Everett Express, Incorporated.

Q And in what capacity do you serve with that company?

A President and general manager.

Q And is your corporation a member of the Tidewater Motor Truck Association?

A Yes, sir.

Q Now, can you tell me when containers first appeared in the Norfolk area?

A I believe it was around 1965. Maybe some before; but I believe it was around '65.

Q Now, would you define for me what your understanding is of a full shippers load?

A Yes, sir. It is a shipment that is loaded on a container, truck or anything, for shipment or transport or whatever, to the consignee.

Q Could you repeat that? I don't think I got all of it.

A I said it is a shipment that is being transported on a trailer, container or whatever you choose to move it on, from the shipper to the consignee.

Q Now, as a motor transport carrier, is your corporation [293] ever selected to pick up full container loads?

A Yes.

Q Tell me how you would be selected to pick up a full container load.

A Well, we would be contacted by a customer who would give us instructions that he would have a load or, if it is containers we are speaking of or whatever, have his broker to contact us and give us the necessary documents for us to pick it up with.

Q All right. Now, what type of documents are you referring to?

A The delivery order.

Q All right. I show you—

A Bill of lading.

Q All right. I show you what has been introduced into evidence as General Counsel's Exhibit 18, and I ask you if you can identify what that is.

A This is a delivery order.

Q Is that the same type of delivery order that Everett Express would use?

A Yes.

Q Now, what does that delivery order provide for specifically?

A The primary purpose of the delivery order is to give the carrier authority to go to the shipper and pick up the [294] freight.

Q So when you say the carrier, are you referring to Everett Express?

A Well, Everett Express, if he is the carrier, yes.

Q And you go down to the pier and what do you do with the delivery order?

A The delivery order, you give it to whoever is in charge of releasing the shipment to you.

Q Would a shipper be, for instance, U. S. Lines?

A It's possible.

Q And you would then deliver that delivery order to the shipper, is that correct?

A Yes, sir.

Q All right. And then, what would happen?

A Well, he would in turn turn the shipment over to us.

Q When he turns the shipment over to you, is the trailer intact—or is the container intact?

A If it is a container, yes, sir, it is in tact; and, of course, we have to go through an inspection line and

inspect it, check it over whether it's road-worthy or whatever and anything that might be wrong with it, have it corrected right then.

Q And this would be with respect to a full shippers load, is that correct?

A Yes, sir.

[295] Q Now, you mentioned a bill of lading. I show you Exhibit 16—General Counsel's Exhibit 16 and ask you if that's the uniform bill of lading.

A Yes, sir, this is the bill of lading.

Q All right. Now, what contractual relationship is involved in the bill of lading, what parties?

A Well, the bill of lading primarily covers the shipper —between the shipper and the carrier.

Q Okay. Now, when you say shipper and carrier, who do you mean?

A When I say carrier, I'm speaking of a truck line or a railroad or Everett Express if he's the principle or the consignee whoever the shipment is going to or consigned to.

Q Assuming you pick up a full shippers load at the pier area, what do you do with it, then?

A Well, of course, from there it is brought to our terminal and billed and from there it is sent out for delivery.

Q Now, have there been occasions when you have for your own convenience opened up a container?

A Yes, sir.

Q All right. For what reasons would you open up a container?

A Well, it could be several reasons. The carrier has the right to inspect any load, so we might want to inspect it.

Q And why would you do that?

[296] A Well, if we have any doubt at all that there might be something wrong with the shipment, or it might not be properly—It might say that this is a load of coffee, and it could have rice in the trailer. Of course, this

would determine your rate; the rate is determined or classified on different items. A lot of times and mainly, if we have a trailer or a container, for example, and we have—Well, let's use Wilson, North Carolina, as an example. If this load is going into the area of Wilson, North Carolina, and we had a load down there to come back say on another steamship company container and we had to take this container and empty it and then load it, this is not profitable for us. If we took the loaded one down there and bring it back empty, that's still not profitable. So we would transfer the load maybe from one container to another in order to do good business, in other words.

Q Now, what size normally are the full shipper load containers that you pick up at the pier area?

A Well, the size of the container?

Q Yes.

A We have some 20's and some 40's.

Q What size container would you transfer the contents into?

A Well, primarily the 20's.

Q What size would you transfer it into of your own equipment?

[297] A Well, it could go into a 40-foot trailer or 45 or whatever.

Q Now, have you ever had an occasion to call a consignee who owns the goods?

A Yes, sir, I've done this quite often.

Q Now, why would you call the consignee who owns the goods?

A Well, we believe it's a good policy to ask the customer, even though they are getting the container which is supposed to be a house to house movement, because sometimes a customer may not want it to come through house to house. So we will call him and ask him if he minds if we transfer his load; and we have never had one to refuse us, yet.

Q Now, you said that containers started in the Norfolk area in 1965, is that correct?

A I would say roughly about that time, yes.

Q Now, between 1965 and the present date, has Everett Express operated with respect to full shippers loads in any different manner?

A No, sir.

Q So when the need arises you strip that container at your facility?

A Yes, sir.

* * * *

[300] Q (By Mr. Auten) Mr. Everett, if you went to the dock and picked up a container that you weighed at your terminal and discovered that it was overloaded, would you strip that container at your terminal and put it into your trailer or would you take it back and tell United States Lines that you weren't going to handle it because it was overweight?

A I imagine I—In fact, I'm sure what we would do is that we would off-load it onto something else and take the additional freight and put it maybe on two trailers.

* * * *

[311] WITNESS EDWARD G. BOCHERT

* * * *

Q And where are you employed, sir?

A Associated Transport, Virginia Beach, Virginia.

Q And in what capacity?

A I'm the manager.

Q And how long have you served in that capacity?

A A little over three years.

Q 1972?

A Yes.

Q Now, would you explain briefly the business of Associated Transport, please?

A Yes, sir, we are Class A common motor carrier of cargo, freight engaged in interstate commerce. And intrastate commerce, also.

* * * *

[313] Q Mr. Bochert, would you describe what a full shippers load is?

A Yes, sir, it's a truckload freight on a trailer consigned to one consignee and one shipper.

Q Now, has Associated ever had occasions to pick up full shipper loads at the Hampton Roads pier area?

A We certainly have.

Q Will you describe the procedure Associated follows in order to pick up a container?

A Yes, sir. We are issued a delivery order or bill of lading from a broker either in the town of Norfolk or from an outside source through the mail. Upon receiving this, we note on the delivery order that we, of course, have been specified by a shipper, a consignee, as the carrier to transport the goods from Norfolk to wherever. The delivery order also spells out where the container in this case is at and at which pier, as I mentioned before.

We check with the pier offices down at the particular pier, say, for instance at the Maritime Terminals, asking the responsible party down at the pier office, is container such-and-such released for shipment. If we are advised that [314] this has happened, we send the local driver with a local tractor to the pier area with his delivery order. He then, in turn, reports to the particular party involved, at whatever steamship line it may be, shows the document proving that we are the carrier of record. There he is instructed the proximity at the terminal where he can find this container. He then goes looking for the container.

Upon finding the container by number, he is checking the number or for the number, he takes it through the steamship's checkout line that they have, where the trailer is checked for DOT and ICC compliance for lights, tires and what-have-you.

* * * *

Q All right. Would you continue please?

A Yes. Once this is accomplished and the container is checked by eyesight by my driver as well as the person

at the pier responsible, U. S. Lines personnel or whatever, it is then placed off to the side. The driver goes in and signs an equipment interchange, where Associated Transport signs for [315] this container and has accepted the responsibility of the container, and this interchange agreement between, say in this case or my case, U. S. Lines with Associated.

He then obtains a pass to exit the premises, the pier or whatever, the terminal area; and he brings the trailer back to my terminal.

Q Now, you mentioned a delivery order. I show you General Counsel's Exhibit 18 and ask you if that is the delivery order.

A Yes, sir, it is.

Q Now, what does the delivery order specifically cover for you to obtain?

A Well, the delivery order would cover the letter, as I refer to it, specifying, like I said, us as the carrier. The consignee's name would appear on this. A lot of times in a lot of cases, who is responsible for the charges that we will be billing for the movement of this particular freight.

Q Could you speak up a little louder, please?

A Yes, sir.

Do you want me to repeat that?

Q No, that's all right. On the delivery order, does that enable you to pick up the cargo itself?

A Yes, it does.

Q Now, I refer you to General Counsel's Exhibit 16 and ask you what that is.

A This is a uniform straight bill of lading.

[316] Q All right. Now, what parties would be subject to the uniform straight bill of lading?

A The shipper, the consignee and the motor carrier.

Q Now, when you are talking about the shipper, who do you mean?

A The party that originates the shipment.

Q That would not be U. S. Lines?

A No, sir.

Q And the motor transport carrier is Associated?

A Right.

Q And the consignee is the beneficial owner of the goods?

A That's right.

Q Now, I show you what has been identified as General Counsel's Exhibit 44, and I ask you if you can identify that document.

A Yes, sir, this is or was the existing contract between United States Lines and Associated Transport.

Q All right. Now, what type of contract?

A An equipment interchange contract.

Q All right. Now, what was the date that that agreement was negotiated?

A May 6, 1969.

Q All right. Now, what does the equipment interchange agreement provide?

A It's a contract between the steamship line and the motor [317] carrier to interchange equipment.

Q Did you have any other agreements with respect to the interchange of equipment with U. S. Lines in existence in March of 1969?

A Not to my knowledge, no.

Q You arrived in 1973, is that correct?

A '72.

Q Do you know of any other agreement that you utilized to exchange equipment with U. S. Lines, other than that document?

A No, sir.

* * * *

Q (By Mr. Rosenstein) Now, I direct your attention to September 24, 1974, and ask you whether you picked up any containers on that date.

A Yes, sir, I did.

[319] Q And these were all destined to a point more than 50 miles from the port area?

A That's correct.

Q Now, you said that you made a determination based on the bill of lading to strip the containers. What entered into your determination to strip the containers?

A Well, for one, the merchandise was that of such that it would not be easily damaged, it wouldn't be pilfered, and also they were large cartons, bulky cartons, but very light cartons, though.

And, of course, the economics of the whole thing with my own equipment sitting in my yard, why take on leased equipment.

Q Well, is there a charge you would have to pay on the leased equipment?

A Yes, sir, there is.

Q How does that work, and who do you pay the charge to?

A It is per diem charges that we pay to United States Lines for lease of their equipment while in our possession.

Q Do you recall any other reasons that you determined to strip the eight containers in question?

A As I recall, one of them was overloaded. We then, of course, instead of going to the broker saying we have a problem, we have an overloaded container, we would have to take it to [320] the pier and whatever, I just adjusted the load on my own equipment, the difference being the containers are much heavier than our own trailers.

Q Do you ever contact the consignee prior to stripping the containers?

A No, sir.

Q Does the broker require you to contact the consignee?

A No, sir.

Q Is there any restriction in the bill of lading which precludes you from stripping a full shippers load at your facility?

A No, there is not.

Q Is there any restriction in the delivery order which precludes you from stripping a shippers load at your facility?

A No, sir.

Q Referring to your equipment interchange agreement that was in existence in September of '74, was there any restriction that precluded you from stripping full shippers loads at your facility contained in that document?

A No, sir.

Q Now, is there any way in which a consignee could require that the 20-foot container remain intact and be delivered as a 20-foot container?

A Yes, there is.

Q And what is that?

[321] A That's by requesting exclusive use of the vehicle.

Q Now, what does that mean?

A Well, that means that the said container will move in tact as it arrived this country to the destination.

Q Was exclusive use of equipment requested on the eight containers that were picked up from U.S. Lines on September 24, 1974?

A No, sir, there was not.

Q Now, is there any reason why Associated would not want the full shippers loads stripped at the pier by deepsea ILA labor?

A Is there any reason why not?

Q Yes. Why would Associated not want that to happen?

A Yes, sir. Because when I am tendered a truckload lot of freight on a United States Lines container, we rate our bills—we come up with the dollar figures. Let me use a hypothetical $400.00 figure. We generate revenue, say, on this particular container $400.00. If this container were to be handled by deepsea ILA labor, their handling charges would be paid by myself, by a shipper, by a consignee. In other words, an added cost.

* * * *

[379] WITNESS ROBERT W. McCLESKEY

* * * *

Q And where are you employed, sir?

A Carolina Freight Carriers Corporation.

Q And how long have you been employed there?

A Approximately seven years.

Q And in what capacity do you serve at Carolina Freight?

A District manager of the Norfolk office.

Q And how long have you served in that capacity?

[380] A Five years.

Q Mr. McCleskey, would you define what a full shippers load is?

A A full shippers load would be a load loaded by one shipper going to one consignee that would fill a trailer either cube-wise or weight-wise.

Q Has Carolina Freight ever had an occasion to pick up a full shippers load at the Hampton Roads pier area?

A Yes, sir.

Q Would you describe how you go about picking up a full shippers load?

A Well, we receive a bill of lading, delivery order usually from a broker in most cases and give the delivery order to a driver who takes it to the pier. You see the proper people in the office down there. They tell you where the container is and the driver goes and finds it and hooks up to it. He will make a preliminary check, pull it through the interchange line. If everything is okay, leave the interchange line, receive a pass on it, and pull it out the gate.

Q When you pick up the full shippers load at the pier, is that container in tact?

A Yes.

Q Has that container, to your knowledge, been stripped at the pier by deepsea ILA labor?

A Not to my knowledge.

* * * *

[381] Q Now, when you get that delivery order, do you call the beneficial owner-consignee?

A Not normally, no, sir.

Q So do you then pull it from the pier area some place after you pick it up?

A We always take it to my terminal with a local driver.

Q Now, I show you General Counsel's Exhibit 16 and ask you if that is a bill of lading.

A Yes, sir, that's a blank bill of lading.

Q And who is that contract between?

[382] A Well, that contract is between myself, the shipper and the consignee when I get to the consignee with it.

Q Does that cover the cargo while it's in transportation to the beneficial owner?

A Yes, sir.

Q Now, from the point that you pulled the full shippers load away from the pier, where do you go?

A To my terminal in Virginia Beach.

Q All right. It that within a 50-mile radius of the port area?

A Yes, sir.

Q Why do you pull it to your terminal?

A Well, we pull it in there and it has to be—we have to cut another bill and it has to be manifested, it has to be hooked to a road truck and given to a road driver.

Q Now, have there been occasions when, for your own convenience, you have opened that trailer and redistributed the cargo?

A Yes, sir.

Q Tell me the purposes that you would do this?

A Normally, there are several reasons. We do it—The main reason is to cut off per diem and get rid of this box that we have no use for in our system. Most of the time, I have my own equipment on the yard empty that I can utilize. We have occasions when road trucks will not hook to these [383] units, the same problems that

were mentioned earlier about fifth wheel settings, king pin settings.

Q Would you go through these and also describe what you mean when you said the trailer would not hook onto the equipment that you pulled from the pier to your facility.

A Well, we have a number of tractors—In fact, a majority of our road tractors do not have a sliding fifth wheel. There are many containers, 40's and 20's alike, that have the king pin which hooks into the fifth wheel set farther back underneath the trailer than most trailers. Consequently, when you hook up to it, the frame of your tractor or the tires of your tractor will hit the landing gear or the frame of the trailer. Some of them you are able to pull, but you ruin two tires. Some of them you are simply not able to pull at all; they will not go. You cannot make a turn with them in any way.

As far as the others, we would like to strip them on occasions to cut off the per diem rate. My trailers, we have nothing shorter than a 45-foot trailer or road trailer, nothing shorter than a 13-foot high trailer; and my smallest trailer is bigger than the biggest container around.

Q Now, you said that you pulled the original container from the pier area. Who owns that original container?

A Normally, the steamship line unless it's a leased box.

Q Now, I direct your attention to June of 1975 and ask [384] whether anything unusual happened to Carolina Freight.

A Well, probably a lot of things. One that I can think of, we were—we picked up a container belonging to NYK Lines.

Q What type of container was this?

A It was a 40-foot container.

Q Was it a full shippers load container?

A It was billed as such, yes.

Q And what did you do with it?

A I stripped it.

Q You brought it back to your—

A I brought it back to my terminal, opened the doors and stripped it.

Q Why did you strip it?

A On that particular day, we had—if memory serves me, that container had 26,000 pounds on it. I had two trailers of my own at my warehouse which had loads for Rocky Mount, North Carolina, which is a break bulk terminal. By stripping this container, I loaded both of my trailers which ended up with 42,000 pounds, approximately, on them and the container, of course, was empty. What I accomplished was running two of my trailers with capacity loads on them as opposed to running those two with less than capacity loads and the container which would have been a third vehicle. I saved a trip. And this is the reason that we stripped it.

* * * *

[386] Q Mr. McCleskey, at what point did you learn that the steamship line and the International Longshoremen's Association felt that there was a violation of their contract if a full shippers load was stripped at your facility?

A Sometime in 1970, the latter part after October when I came in. Shortly after I came in.

* * * *

[392] WITNESS M. L. CHADWICK

* * * *

Q Where are you employed, sir?

A Hennis Freight Lines, Portsmouth.

Q And in what capacity?

A Assistant manager.

Q How long have you served in that capacity?

A Since September of '72.

Q How long have you been employed at Hennis Freight?

A The same length of time.

Q Is Hennis Freight a member of the Tidewater Motor Truck Association?

[393] A Yes.

Q Mr. Chadwick, would you define what a full shippers load is?

A It is a load from one consignor, or shipper, to a consignee which is a full load.

Q Now, has Hennis Freight ever had an occasion to pick up a full shippers load at the pier area?

A Yes.

Q Would you describe the procedures that you follow when picking up a full shippers load?

A Well, we receive instructions from a broker by way of a delivery order and a bill of lading instructing us to go down to the pier and pick up a particular shipment; and we so do, by going through the process of going to the pier offices and checking the unit out and so forth, and sign the interchange agreement on containers and take it back to the terminal.

Q I show you what has been marked as General Counsel's Exhibit 18 and ask you if that is a delivery order.

A Yes.

Q All right. Now, what does the delivery order control, what does it mean to you as a motor transport carrier?

A It is instructions to the pier or steamship line to release that cargo to me, the carrier.

Q Now, I show you what has been marked as General Counsel's Exhibit 16 and ask you if you can identify that.

[394] A Yes. It's a bill of lading which is a contract between the shipper and the carrier. This binds the carrier for total responsibility of the cargo that he is handling for this particular shipper until such time he gets it and delivers it to the consignee.

Q All right. Now, do you have equipment interchange agreements with steamship carriers in the Hampton Roads area?

A Yes.

Q Do you have one with U. S. Lines?

A Yes.

Q Do you have one with NYK Lines?

A I believe so, yes.

Q Have you ever had an occasion to personally observe the equipment interchange agreement?

A I have not.

Q What does the equipment interchange agreement provide for, to your knowledge?

A The exchange of equipment. My interpretation would simply be that we would be responsible, and we would check the equipment, the tires, lights and what-have-you, just the container itself or trailer, and we would be responsible.

Q Once this inspection has been made, you indicated that you pull the container to the terminal facility of Hennis, is that correct?

A Yes.

[395] Q Prior to your pulling it away, was the container itself intact?

A Yes.

Q To your knowledge, was the container stripped at the pier by deapsea ILA labor?

A No.

Q Have you had an occasion, upon pulling the container to your facility to strip that container?

A Yes.

Q For what reasons would you strip a full shippers load at your facility?

A Our reasons would be mostly economical, or economics, I'll say.

Q Would you elaborate as to what you mean by economics?

A Yes.

If we should go down to the pier and pull back a 20-foot container that, let's say, has 12,000 pounds on the container, then, of course we certainly are charged per

diem for this. Now, we pull these containers. In other words, the cargo is destined to such points as Chicago, Milwaukee or what-have-you which is seven, eight or nine hundred miles away. The per diem is quite expensive. I think it goes up as high as seventeen fifty a day after a certain element of time.

So, consequntly, we will strip this cargo off of the container and put it normally in a 45-foot trailer and [396] consolidate it with twenty or thirty thousand pounds of freight and move it in that way.

Q Has a beneficial owner-consignee of cargo ever told you that you should not or could not strip the container and put the cargo on your own truck?

A No.

Q Now, are you familiar with the Hampton Roads Shipping Association and the International Longshoremen's Association contract?

A I am familiar with the fact that they have a contract.

Q Have you ever read the contract?

A No.

Q Has anybody from any of the shipping lines that you have equipment interchange agreements with told you that you should not strip containers at your facility?

A No.

Q Do you recall when containerization came into the Hampton Roads area?

A I believe '65 or '66.

Q From '65 or '66 to the present date, have you followed the procedure based on your own needs of Hennis Freight to strip a full shippers load at your facility?

A Yes.

Q Has anybody from the International Longshoremen's Association told Hennis Freight that they could not ship a [397] full shippers load at the facility of Hennis?

A Not to my knowledge, no.

* * * *

[402] WITNESS ALLIE S. McNEIL

* * * *

[416] Q Now, you indicated that you were vice president of D. D. Jones.

A Yes.

Q Will you tell me the type of operation that D. D. Jones is in comparison to Associated, Pilot or Thurston?

A Well, D. D. Jones is a combination. They are a motor carrier. In fact, they are the largest motor carrier in the local area, having some 65 tractors there. In addition to that, they are the largest warehousing and distribution company in the local area, having been in business for some [417] 40 years.

Q How is the warehouse operation different than an operation such as Associated, Houff, or Pilot and Thurston?

A Well, the warehousing operation, as I say, is a distribution company. We are set up mainly to handle distribution of cargo; and, of course, about 60 percent of that is related to the import cargo which comes across the piers.

And the operation we perform for a shipper is different because we will bring cargo that a shipper so designates to our facility and we wil perform any services. We actually unload the cargo, we store, we might break it down and repack it, we prepare documents for shipping. We are a distribution firm, in that sense of the word, as far as the warehousing operation is concerned.

Of course, that operation was greatly hindered by the contract itself, not on any control of our own but beyond our control.

Q First of all, let's talk about when did containerization, to your knowledge, come into the Hampton Roads area?

A Well, containers have been in existence—It really became prevalent about 1965; but there were containers in the area prior to that.

Q But when did they first become prevalent?

A About 1965.

[418] Q Now, talking only as to the warehouse operations of D. D. Jones, tell me what D. D. Jones did when a full shippers load came into the pier area, keeping in mind that we are talking about bringing it back to the warehouse. What did you do, what were the procedures that you followed?

A Let me ask you what time frame.

Q 1965.

A In the 1965 period, we would pick a container up. We would have instructions or a bill of lading issued to cover that movement from the pier to the warehouse, just like an over-the-road movement or longer distance. You would pick the container up, unload it—take it to our warehouse, unload it and return the empty unit to the steamship line.

Q In 1965 was that type of container going to your warehouse stripped by ILA labor?

A No, it was not.

Q 1965, tell me the procedure that you followed with respect to bringing full shippers loads to your warehouse.

A The full shippers load would move in tact to the warehouse.

Q In 1967?

A The same.

Q Were there any changes in 1968?

A Yes. In 1968, there was—we were advised that there was a new contract that was going to be effective between [419] the steamship industry and the Longshoremen's Association, and that these units no longer would be able to move to the warehouse facilities within these 50-mile radiuses.

Q Now, how did that change and affect the operation procedures of D. D. Jones' picking up a full shippers load at the pier?

A Well, in a container, we could not pick up a full shipper load in a container because they would not release it to us. We had the right to do so and we had the right to act as the distributor for the shippers, also; but, because of this contract which knowledge of the contract had been passed onto the brokers which in turn had published this to the shippers, although they didn't agree to it, they would not allow—the steamship lines would not turn the containers over to us to come to the warehouse directly.

Q Tell me what D. D. Jones did when you went to the warehouse—or to the pier area starting in 1968 to pick up goods at that time?

A We would send our own trailers to the pier facilities, and our trailers would be loaded and we would dray it back in our own equipment to the warehouse.

Q What did ILA do as opposed to what they did in 1965 through 1967?

A Well, back in 1968 they were stripping the containers on the piers.

[420] Q So deepsea ILA labor would strip the container at the pier; and then, your trucks would pick it up and take it back to the warehouse?

A Yes.

Q Now, how long did that practice remain in tact?

A For about three years or until this CONASA negotiation took place.

Q Are you referring to the Dublin rules?

A Yes.

Q All right. In 1973, the Dublin rules came into effect.

Now, how did that change the warehouse operation of D. D. Jones with respect to picking up loads at the pier area?

A Well, at that time, of course, what they classified as a full shipper load owned by one consignee, it was agreed that it could move to a destination within a 50-mile radius under the sole ownership policy.

Q Now, how did D. D. Jones get affected, did it go to your warehouse?

A Yes. Okay. Under a full shippers load as designated, we could pick that container up, take it to our warehouse and then strip it and then return the empty unit to the steamship line; but there were many restrictions. That was only on one classification of goods. That was just probably a small percentage really of the total traffic.

* * * *

[568] WITNESS JOHN M. HAYNES

* * * *

Q (By Mr. Lambos) Captain Haynes, by whom are you employed?

A The New York Shipping Association.

Q How long have you been employed by New York Shipping Association?

A Since June 1, 1958.

Q What is your present position with New York Shipping Association?

A Executive vice president.

* * * *

[584] Q Now, did the New York Shipping Association at that time represent most of the carriers who operated on the North Atlantic Coast?

A They are represented—Well, yes, most of them. We had at that time 145 members.

Q And you are referring to 145 steamship carriers who were members at that time?

A Yes.

Q And, in addition to that, did you have certain associate members?

A Yes, we did.

Q Who were the associate members?

A They were the stevedoring firms, the port watching firms, there was one or two firms that only did checking work. And there were some that did carpentry work. And still are, in fact.

Q Parenthetically, did you attend all of the sessions in the 1959 collective bargaining?

A Yes, I did.

Q Could you tell us whether containerization was one of the major issues in that bargaining?

A Yes, it was.

Q Could you give us some of the background as to how it came—that containerization became an issue in the 1959 [585] collective bargaining?

A Well, it started to be an issue in the fall of 1958 when the ILA stopped a half a dozen of containers up on the North River that were—They said they weren't going to handle them because it was taking work—Actually, it was the gangs. The initial grievance came because the gangs on the ship felt that they were losing work by the use of containers. That's the way it all started, from that.

Q Stop there for a moment. Could you describe it for us how it was that a gang member—that is, one working on a ship's gang—complained that containers were taking away his work opportunity?

A Okay. These six containers were 20-foot containers; and a 20-footer should handle about eight or nine weight tons. Okay. Now, they left that with one draft and put it in the ship instead of eight or nine drafts if it's on pallets. Then, when you lift a box and put it in the ship, it's in stow the minute that you land it; but, if you take it on pallets and put it in ship and then remove it from the pallet and put it to a place of rest in the hold of the ship, then, it takes a lot longer. And the gangs felt they were being deprived of work by the use of these boxes because they had, by this time, started to become noticeable. It wasn't a great big 20 percent of our cargo in containers, then; it was like in the deepsea trade probably about half of one percent or one percent. But it [586] had started to become noticeable.

Q Now, you are talking about the deepsea trade. Was there also an advent of containerization in another trade?

A Yes, in the Puerto Rican trade, which is really the deepsea trade; but I separate it in my own mind, because it was a different run. And that had become containerized, I think, in originally in '57. And there, they were using this one company, the Pan-Atlantic at the time which, subsequently, became Sea-Land. They were using full container ships; that's all they put on is the 35-foot boxes and the 20-foot boxes.

Q Now, Captain, will you tell us what the reaction of Longshoremen in the Port of New York was after the advent of containerization at a point in 1957 with the introduction by the Pan-Atlantic of the first container ship?

A What was their attitude? Well, there wasn't too much of a problem with the Puerto Rican, because they started it in an area where they didn't have too much work. They started it in Newark. And, therefore, it was a new operation to that group of people. The company started business and everybody that they hired was new. It was a job for someone for whom there wasn't that much work in the beginning. Okay. So it meant something to those people. Therefore, that operation got off the ground and got going because it started where it was started, with a group that was depressed.

Q Now, did there also come to be the use of containers here [587] and there on the decks of break bulk ships?

A Yes. In '58 it started—they started handling containers in the overseas routes. They would put them on deck in the squares of the hatches. Mostly, this was Dravo sizes and the 20-footers. They weren't really into the 40-footers yet; but, at that time, it was Dravo, the 20-footers.

A Could you tell us what the reaction of the Longshoremen generally was with respect to that type of container throughout the port?

A Well, you know, in the beginning, like anything else that starts new, it wasn't too critical. As I said, the first grievance that I have any recollection of or that

I can find any record of was the one—I think it was in November of 1958. And this grievance came up because the gangs were complaining about the fact that there were going to be less and less work for gangmen. It didn't seem to matter much to the terminal labor, because they were putting the cargo into the box. The gang was the one complaining, because the cargo was being taken to the pier and put on the ship in one draft instead of ten or twelve drafts.

* * * *

[594] Q More specifically, Captain, what is the rule that has been followed with respect to a container containing the goods of one shipper or one consignee destined to that consignee's place of business either within or without the area which is short-circuited and stripped by trucker's employees at the trucker's platform?

A That's a violation; you can't do that.

* * * *

[601] Q And could you turn to the rules on containers and explain to the Court, if you will, those provisions of the rules on containers which made it a violation for any carrier member of New York Shipping Association to have his container destined either for a point outside the geographic area of 50 miles from the center of the port or destined to a consignee within the port area to have his container stripped at a trucker's terminal?

A Why is it a violation?

Q Yes. What in the agreement makes it a violation?

A Rule 1(a), (b) and (c).

Q Now, could you explain that to the Court, please?

A Well, if a container comes in and it's taken from the pier to a point not its destination and the cargo is removed by other than ILA labor, then, that's a consolidated container and is a violation.

The cargo came to the pier and was picked up by truck and taken to its destination, historically. Okay?

Now, when you take that container off the pier and you stop it and take the cargo out of it and it hasn't gotten to where it's going, then, that's obviously a deconsolidation. What you're doing is taking it out and you are distributing it. Okay?

That's the same as if you had 15 chop marks in there, 15 different consignees in there. It's exactly the same thing. [602] You're distributing them; you are making up a new load.

* * * *

[622] Q All right. Another example. What if, instead, I picked up a 20-foot box that I've got to haul through the State of Virginia and I look at the weight limitations that are effective in that state and find that I do not have a sufficient distance between my axles to allow me, under that state's law, to tow that box. What I do is to break the seal—

* * * *

Q (By Mr. Auten) So, what I do is strip the box and I take it out of that 20-foot container and, instead, put exactly the same contents and nothing more and nothing less in a container that belongs to me and take it straight to the consignee. Have I violated the rules, then?

A In my judgment, you have.

Q What have I consolidated, sir?

A The weight—When you pick up the container, you are [623] aware of the weight. If the bill of lading said that it was owned by one person and going to that person's warehouse or that person's—not warehouse, but factory in Savannah or whatever place it is. When you picked it up, you knew the weight; and, as a trucker, I'm sure you would be aware of the restrictions. So, at that point, if you couldn't haul it over the road, it should have been stripped on the pier. That would be a violation, in my opinion.

* * * *

[645] WITNESS JAMES J. DICKMAN

* * * *

Q (By Mr. Lambos) Mr. Dickman, by whom are you employed?

A By the New York Shipping Association.

Q Could you tell us the capacity in which you are employed?

A I am president of the New York Shipping Association.

Q Is the New York Shipping Association a member of CONASA?

A They are.

Q Do you have any connection with CONASA?

A Yes, I'm the president of CONASA.

Q How long have you been the president of CONASA?

A Since June of 1971.

* * * *

[700] Q Well, with respect to the public warehouse, is it not a fact that New York, that you allow employees of a public warehouse to strip containers destined to a consignee?

A If it remains in the warehouse over 30 days.

Q What if it doesn't remain in the warehouse for 30 days?

A Well, prior to our dispute in 1974, if it was a matter of inventory taken out and it was a bona fide warehouseman, then, we allowed that cargo to move. But, in most cases, a [701] bona fide warehouseman, his cargo would remain in the warehouse over 30 days.

* * * *

[750] Q Well, prior to this '75 date, was it a violation of your warehouse rules if the cargo—if the cargo going to the warehouse was moved within the 30-day period?

A If it was a bona fide warehouseman, it wasn't. The union's contention was that there were people coming up who were not bona fide warehousemen, so they stopped everybody.

Q I know. But that isn't what I'm talking about, now. I'm talking about bona fide warehousemen.

A Could move it, yes.

Q They could move it; and that did not create any violation.

A No.

Q So this 30-day bit just came into effect this year?

A Yes.

* * * *

[753] WITNESS THOMAS W. GLEASON, SR.

* * * *

Q (By Mr. Gleason) Mr. Gleason, who are you employed by?

A The International Longshoremen's Association.

Q How long have you been employed by them? By the ILA.

A As a union official?

Q Yes.

A Since 1933.

Q What is your present position?

A I'm International President.

Q When did you become president?

A 1963.

* * * *

[770[Q Now, prior to '68—prior to the rules being written out, what was the procedure with reference to warehousing in the Port of New York?

A I'm 60 years there; and, as long as I can remember, warehousing on certain commodities has been from time immemorial a part of the transportation business. We had no intention of ever upsetting this. The only ones that we were after were the phony guys or the guys who was going out and getting these customs stations set up and knock the legitimate guy out of business by undercutting his rates and everything else. And they were only doing this, and this freight was being parceled out because of the wages the Longshoremen were getting and

these stump-jumpers or under the hat guys were getting $2.50 an hour or something like that.

Q Now, when you say bona fide warehouse, what do you mean [771] by a bona fide warehouse?

A A man who is in the regular warehouse business. When you are dealing in the commodity market and the buyers buy at a price and they store it through a warehouse, cocoa, coffee, certain kinds of canned goods and stuff like that. Large shipments of radios probably was bought and put into warehouses and would stay there. And what they would do there is in those warehouses—and I'm talking about the bona fide warehouses now—they would build up a permanent inventory in there. There would be a permanent inventory in there in case they needed any of this merchandise at a particular date, they wouldn't be taken from the fresh stock going in there, and it would be taken out of the permanent inventory.

* * * *

[819] Q Now, what was the procedure with reference to the warehousing prior to the 1968 agreement?

A The freight that was to be warehoused would go directly into the warehouse, the bona fide warehouse, and it stayed there for 30 days. This was our agreement with Mr. McAvey at 4:00 o'clock in the morning.

Q That agreement with Mr. McAvey, when did that take place?

A It took place some time in February, I guess of 1969.

Q Fine. So that there was an oral agreement prior to the signing of the 1969 agreement or '68 agreement?

A Right.

Q As far as the warehousing of cargo?

A Right.

Q Now, even though that does not appear in the '69 contract, was that the practice followed throughout the contract?

A That was the custom and practice.

[820] Q Now, was that put into writing by interpretation in the Dublin meeting?

A Right.

Q Now, when you got down to 1974, was the language clear as to the meaning of that warehousing as far as the union was concerned?

A I believe it was.

Q Then, what was the problem, that you had to reopen the contract?

A Because some of the truckers—some of the truckers were getting warehouse licenses and didn't have the space and they were chiseling. They were taking the loads to their place of business and becoming distributors. This was not being warehoused at all.

Q Was there a question as to whether or not it had to remain in the warehouse for 30 days?

A Oh, yes, we always insisted upon them remaining in the warehouse.

Q But was that the reason why?

A That was one of the reasons, right.

Q So that that 30 days was then added to the contract—

A Right.

Q —in the 1975 renegotiations?

A Right.

* * * *

[829] WITNESS RICHARD PATRICK HUGHES

* * * *

Q (By Mr. Gleason) Mr. Hughes, who are you employed by?

A By the Steamship Trade Association of Baltimore, Inc.—International Longshoremen's Association Container Royalty Fund. I'm the administrator.

Q How long have you been employed there?

A Since 1971.

* * * *

[861] Q Did you hear Mr. Dickman's testimony when he testified that it had been considered that when a trucker touched a full shipper's load at his terminal, that it then became a consolidated load?

A Yes, sir.

Q Do you agree with that?

A Yes, sir.

Q Well, was that the interpretation that was made by your container committee?

A My container committee?

[862] Q Yes.

A You mean the committee in Baltimore?

Q Yes.

A Yes, sir, that's their contention. It has been their contention, is their contention.

Q You say that your committee has said that when a trucker touched it, it in all cases then became a consolidated load?

A Well, I can't say that. I can only say that they said that it was a violation for a trucker to unload it. What they related it to, I don't know. I mean, the only thing I can say is that people presented arguments and then they voted.

Q But you didn't go around referring to that load, after the trucker had touched it as a consolidated load, did you?

A No, I referred to it as—that that guy is a distributor.

Q Let me ask you another question. When a trucker, a motor carrier, takes two 20-foot boxes and strips it and puts them into his 45-foot over-the-road trailer is he consolidating in violation of the rules—is he stuffing in violation of the rules?

A Yes, he's becoming a distributor. That's my phrase. He's becoming a distributor of the cargo, which is a violation of the agreement.

* * * *

[876] Q Now, after they renegotiated that contract in 1975, were there any changes in the rules on warehousing?

A No.

QThe rules, were they the same as prior to the 1974 agreement?

A Right.

Q Now, with reference to container loads, as manufacturer's label, if a container—if two 20-foot containers coming from Europe, discharged from a ship in the Port of Hampton Roads, was sent to a truckman, picked it up and took it to his place of business and stripped it and placed it in his own truck for delivery outside the 50-mile radius, was that a violation of the contract?

A It certainly was.

* * * *

[953] Q When you investigated the container case and discovered that a motor carrier had stripped a container within the designated geographic area, and that that container was destined to a single consignee outside the geographic area, you charged him with a violation, correct?

A Correct.

Q Now, did you ever consider that—Well, let me put a case to you. Let's presume that it was a case in which—Well, first, let me ask you if there has ever been a case like this. Have you had a container case where it appeared to you that the motor carrier stripped a box and simply took the contents of that box without adding to him or subtracting from them and stuck it in his trailer and pulled it to a destination outside 50 miles?

A I wouldn't know that.

Q You would not know that?

A I would not know what he did with the box, after he stripped it.

Q All right. Would you consider it a violation of the rules if he did that?

A Certainly.

PLAINTIFF NO. 20

[SEAL]

UNITED STATES LINES, INC.
Suite 617, 1620 I Street, N.W.
Washington, D.C. 20006 (202) 785-9770

April 11, 1974

Mr. Cletus E. Houff
President
Houff Transfer, Inc.
P.O. Box 91
Weyers Cave, Virginia, 24486

Dear Mr. Houff:

Further to my letter of April 4, I wish to advise that I am now in receipt of a complete report relating to the difficulties you have encountered with your interchange agreement with United States Lines.

We are advised that on the shipment of two 20 foot containers destined for Union Carbide Corp. in Alloy, West Virginia, you elected for operational reasons to strip the containers in Baltimore and reload them into one of your own trailers.

This, of course, is in violation of the rules, and as a result of this action, the United States Lines was fined $2,000 by the Steamship Trade Association of Baltimore.

Under the circumstances, United States Lines had no recourse but to exclude your company from our Interchange Agreement until such time as you deem it in your best interest to satisfy our request for payment of this fine.

This matter is under the complete jurisdiction of Mr. George Maier, our Port Manager in Baltimore, and should

you have any further questions, I would recommend you contact him directly.

Very truly yours,

UNITED STATES LINES, INC.

/s/ J. Daniel Smith
J. DANIEL SMITH
Special Ass't to the President

cc: E. Lamma, Walker, Mfg.
G. Maier, USL, Balto.
E. Frey, Balto.
K. Edler, N.Y.

PLAINTIFF NO. 21

[SEAL]

UNITED STATES LINES, INC.
One Broadway, New York, N.Y. 10004
(212) 344-5800 Cable: Seapost

April 12, 1974

Certified Mail
Return Receipt Requested

Mr. Cletus E. Houff
Houff Transfer, Incorporated
P.O. Box 91
Weyers Cave, Virginia 24486

Dear Mr. Houff:

We received your letter of April 1st, with which you request clarification of your status as carrier handling United States Lines equipment.

I have been advised by our Baltimore office that your Baltimore terminal sometime in mid-February, picked up two 20 ft. containers from our Baltimore terminal and for their own convenience stripped these two boxes in the Baltimore terminal and transferred the loads into your equipment. This activity apparently was observed by the I.L.A. and United States Lines has been obliged to pay to the I.L.A. a fine of $2,000.

I am sure you are familiar with this case and I don't need to go into every detail. Our Baltimore office has been in touch with your Company but have been advised that Houff Transfer is not inclined to reimburse United States Lines for this fine which was incurred through actions of your personnel.

As a result of this it was decided not to permit your Company to handle our equipment.

The reason for not having advised you officially of cancellation of your Interchange Agreement, is simply that I had hoped that you would have a change of heart and agree to reimburse us for a fine incurred through no fault of ours.

Inasmuch as no further developments have come about, please accept this letter as our ten (10) day notice as per paragraph ten (10) of the Interchange Agreement executed on March 18, 1970 between your Company and United States Lines, Inc. Unless we hear further from you indicating your willingness to settle this matter the above Interchange Agreement shall be null and void as of April 22, 1974.

I regret as to take this action but your attitude has left us no choice.

Very truly yours,

/s/ Klaus W. Edler
KLAUS W. EDLER
Manager,
Interline and Leasing

KWE:cs

cc: Mr. G. Maier
Mr. D. Schierloh
Mr. D. Smith
Mr. R. B. Murphy
Mrs. H. Sunhill

OFFICIAL REPORT OF PROCEEDINGS BEFORE THE NATIONAL LABOR RELATIONS BOARD

Docket No. 5-CC-925
5-CC-929

IN THE MATTER OF:

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO;
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
ATLANTIC COAST DISTRICT, AFL-CIO;
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
LOCAL 953, AFL-CIO

—and—

THE TERMINAL CORPORATION

Place: Baltimore, Maryland

Date: August 27, 1979
August 28, 1979
August 29, 1979
August 30, 1979

DESIGNATED PORTIONS OF TESTIMONY IN *THE TERMINAL CORPORATION*

* * * *

[110] WITNESS WERNER MOMM

* * * *

[111] Q (BY Mr. Holzman) Where do you live, Mr. Momm?

A I live in Germany, representing the German company.

Q What company is that?

A Dolomitwerkes. It is a refractory company in Germany.

Q What is the business of Dolomite?

A We are supplying a special kind of refractory material to this country for steel plants, for the making of specialty steels.

Q Is that also known as fire brick?

A Yes.

Q How long have you worked for this company?

A I am working for this company for the last 7 years.

Q Currently, in what capacity do you work for the company?

A I am the sales manger for the United States.

Q How long have you held that position?

A The last two and a half years.

Q There has been a stipulation that in about May of 1978, your company and Terminal entered into an arrangement.

A Yes.

[112] Q Whereby your company would ship containers of fire brick to Terminal.

A That is correct.

Q Prior to entering into that arrangement with Terminal, how were you handling your United States accounts at that time?

A In more or less the same way, except that we did ship directly to our customers in various parts of this country.

Q Are you talking about containers or break bulk?

A Containers.

Q When you say directly to your customers, could you expand on what you mean by 'directly to your customers.'

A Short of using warehouse facilities we have now an agent here in Baltimore, which is where the Terminal Corporation is.

We just ship the materials through the Port of Baltimore, directly to our customers such as Pittsburgh or New York, New York State.

Q That would be the user of the fire brick?

A Yes.

Q Are you aware if the International Longshoremen's Association ever stripped any of your containers of fire brick in the past?

A Not to my knowledge.

Q Under the arrangements that you have with Terminal, [113] Terminal strips the contents of the containers.

A Yes.

Q And puts it into their warehouse?

A That is right.

Q Who gives the instructions of what is to be done to your goods after that?

A The instructions come either directly from our office, or while I am in the United States, I, in many cases, handle this directly from my location here in United States.

Q Those instructions would consist of what?

A The instructions are to ship certain quantities, certain types to our customers in this country.

Q The facilities that you have with Terminal, is that to fill current orders, or to warehouse—What type of arrangement do you have?

A To fill current orders. There is a necessity, in order to be able to supply our customers more quickly with the material, rather than shipping directly, what would require more time. So in order to have material here, we

decided that the warehouse would be essential for our conduct of business in this country.

Q When the material arrives at Terminal, is it already sold to be shipped our, or is part of it just to be maintained for backlog?

A I would say part of it is sold already before it comes in, and part of it, of course, to have a certain margin [114] of supplies. We have to ship more than we immediately need, but most of it I would say goes directly on very short time after receipt to the customer.

Q What type of time are we talking about?

A In the last year it has been so that we have already waited for the material to come in, and every day, every minute did hurt us because the material was needed.

Q Is it the rule or exception that it stays more or less than 30 days in the warehouse?

* * * *

THE WITNESS: Yes, of course, our calculations are such we would probably ship it as quickly as possible because keeping the material costs us money.

Q (BY Mr. Holzman) Using 30 days as a storage criteria that I am talking about?

A I would say it would be less.

* * * *

[118] Q (BY Mr. Eisenstadt) Mr. Momm, your problem seems to be focused on satisfying the customer's needs?

A Yes, definitely.

Q So therefore when you put the bricks into the warehouse you are able to more finitely give the customer exactly what he needs at a particular time. Is that right?

A Yes.

Q In order to accomplish this, of course, you have to take the bricks out of the container first. Is that correct?

A Yes.

Q They don't leave the container in the warehouse. They take the bricks out of the containers.

A That is right.

Q But to take those bricks out of the containers, I suppose you need hi-low equipment. Is that right?

A I would say so.

Q What is the process of taking the bricks out of the container?

A I don't know what kind of equipment Terminal is using, in particular. Yes, you do need automated or some kind of mechanical equipment to remove the pallets, yes.

Q When the containers are loaded in Germany, how do they load the containers?

A I would say the same way you unload them here, by [119] having the mechanical equipment to load them.

Q To take it out?

A Put them in Germany, yes, and—

Q Does Terminal have any particularly unusual equipment that is used for this type—

A I wouldn't call it unusual equipment.

Q Nothing unusual.

A What is unusual?

Q Well, do they use a forklift, some special computerized synchronized type of equipment?

MR. HOLZMAN: We will stipulate nothing unusual.

Q (BY Mr. Eisenstadt) Nothing unusual. So, in other words when you take the bricks out of the container it could be done outside of this courthouse, isn't that correct?

A No. Especially not in this kind of weather, because the bricks are very sensitive to moisture.

Q But if I brought it over to a shed and I took the bricks out and put them into a covered truck—whether it is covered by canvass or covered by just the truck's own configuration, that could be done also any place I wanted to wherever I let go of the container.

A I wouldn't say that, sir, because our bricks are also —even though of course they are bricks, they are quite brittle and any handling by people who are not familiar

with that type of brick, I think they could do a lot of damage.

[120] Q How long ago did the Terminal Corporation employ employees who are specially familiar with your type of bricks?

A I wouldn't say that they were familiar with our bricks. I am only saying that it is important—not just anybody can take bricks out and handle them like anything.

* * * *

Q (BY Mr. Eisenstadt) When you take containers over the road, let's say from the pier to a warehouse, do you need any special types of springs? Do these containers have some special types of devices that stop the bricks from shaking?

A Not to my knowledge, no.

Q I don't really have to take that container over the road. [121] I can even put it in a truck and take it over the road, isn't that right?

A Again, I would say that would mean extra handling and we have found that extra handling would increase our breakage.

Q You know already—let's say five containers come in from Germany and you know that a certain amount of this brick inside of these containers, you know that they are going to Customer X, is that right?

A Yes.

Q And a certain amount of this type and that type and another type of brick are going to go to Customer Y. Is that right?

A Yes.

Q Why can't that be done down at the pier. Why can't they take those bricks out and send it to customers—

A No.

* * * *

[122] Q (BY Mr. Eisenstadt) Mr. Momm, how are these bricks loaded? How are they transported inside the container? Are they just one brick on top of another?

Are they on pallets?

A They are on pallets, yes. In cardboard and special moisture-proof packaging, and that, of course, is again why we have to be careful. If you break the packaging, then of course the bricks are exposed to the atmosphere and they will dehydrate and therefore become useless.

Q As far as the bricks that are going to customers with whom you already have orders, can these bricks be removed from the containers arriving in the U.S., in the Port of Baltimore, and sent from the marine terminal—the maritime terminal—to the customer?

A No.

Q It cannot be done?

A No.

Q Why not?

A Because, first of all, that would mean that you have the entire container sent to the customer. Of course, this container may contain a number of different bricks.

[123] Q I think I misunderstood. Let me be more clear. If you have certain bricks in a container—Container No. 1 has certain bricks; Container 2 has certain bricks; Container No. 3 has certain bricks—You know the customer needs five tons from No. 1, two from No. 2, three from No. 3.

A Yes.

Q These can be removed, put together and sent to the customer, can't they?

MR. HOLZMAN: Objection.

MR. EISENSTADT: I am asking the witness whether they can or cannot.

THE WITNESS: You see when you say can or cannot, it is not that simple, you know, because first we have different types of bricks, different qualities, and our customers have difficulties identifying the various kinds of bricks when they get them. They should know because they have used those bricks for two years now, and yet they have difficulty.

So I don't expect anybody here in the Port who is not familiar with those bricks to make any identification.

Q (BY Mr. Eisenstadt) Isn't it a fact that by sending the bricks to Terminal, you are not even giving the people at the pier to know the differences in the bricks?

A They have instructions from us, an explanation of various codes and numbers.

[124] Q Cannot those be given to Longshoremen?

A Like I said, if the steel companies cannot handle that and it is their job, then I don't know whether it is so simple.

Q Do they have any special rapport with Terminal that other people cannot absorb?

A Anybody can learn it, yes.

Q Anybody can learn it.

A Provided he has the know-how and the background, yes, he can.

Q Are you aware of whether longshoremen handle very complex merchandise?

A Yes, but I don't think they know all the things they are handling, sir.

Q Do you know whether or not they have ever mishandled your bricks?

A Of course—

JUDGE SCHNEIDER: Who is "they?"

MR. EISENSTADT: Longshoremen.

THE WITNESS: I cannot say no, not anything in particular. Of course, like I said, handling itself is very damaging. Period.

* * * *

OFFICIAL REPORT OF PROCEEDINGS BEFORE THE NATIONAL LABOR RELATIONS BOARD

Docket No. 5-CC-899

IN THE MATTER OF:

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO:
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
DISTRICT COUNCIL, BALTIMORE, MARYLAND:
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
LOCAL 953 and
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
LOCAL 333

—and—

BECK ARABIA, LTD.

Place: Baltimore, Maryland:

Date: September 28, 1978
October 4, 1978
October 5, 1978

DESIGNATED PORTIONS OF TESTIMONY IN *BECK ARABIA, LTD.*

[—] JOHN THOMAS GREER

* * * *

Q You are employed by Beck Arabia?
A Yes, in Dallas.
Q What is your title?
A I am a procurement manager.
Q You said you were located in Dallas, Texas?
A Yes, sir.
Q Does Beck Arabia have an office in Dallas, Texas?
A Yes. We have a branch office in Dallas, Texas.

* * * *

[47] Q (BY Mr. Eisenstadt) Let me reiterate the question. Do you know how these containers were obtained —the containers involved in this case?
A Yes. We contacted the shipping line.
Q Which shipping line?
A I think it was Central Gulf in this case.
Q Go on.
A Made arrangements to have containers moved to the Shipside Packing Company.
Q To have containers moved, you say. Do you know, if at all, whose containers they were?
A No, I do not.
Q So Central Gulf made containers available at the Shipside premises for stuffing. Is that correct?
A Yes, sir.
Q Mr. Greer, do I understand correctly that the only thing Beck Arabia does in this country—the United States —is to arrange for the purchase of materials for the construction of various commercial and other facilities in Saudi Arabia?
A In addition we coordinate engineering requirements with the architect, if the architect is located in the United States.

* * * *

[50] Q As far as operations from Dallas, under your regime, have you ever had any goods moved through the Port of Baltimore that were processed by other than Shipside?
A To my knowledge, no.
MR. EISENSTADT: Thank you.
JUDGE BARBAN: Mr. Greer, I have one question. The carrier, Gulf—
THE WITNESS: Central Gulf.
JUDGE BARBAN: Do any Beck Arabia employees, or yourself, play any part in what Gulf does with its containers—how it gets them, Shipside or anyone else?
THE WITNESS: No, we just give them a schedule of when we need them.
JUDGE BARBAN: That was my reason for asking. You give them, in effect, instructions as to what you would like them to do.
THE WITNESS: The size and when we need them, yes.
JUDGE BARBAN: You then assume that they do what you instruct them to do. Is that the idea?
THE WITNESS: Yes, sir.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 84-861

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

ORDER ALLOWING CERTIORARI

Filed January 21, 1985

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

Justice Powell took no part in the consideration or decision of this petition.

☆ U. S. GOVERNMENT PRINTING OFFICE; 1985 469225 11030

No. 84-861 (11)

In the Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Whether the National Labor Relations Board correctly concluded that collectively bargained rules governing the use of containers in the shipping industry, although having a valid work preservation objective in other aspects, lack such a valid work preservation objective in their application to certain specific but widespread practices of motor carriers and warehouses and therefore, to that extent, constitute unlawful secondary activity under Sections 8(b)(4)(B) and 8(e) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(B) and 158(e).

PARTIES TO THE PROCEEDING

The decision of the court of appeals was issued in four consolidated cases seeking review or enforcement of decisions of the National Labor Relations Board. The International Longshoremen's Association, AFL-CIO (ILA), appeared as petitioner in one of those cases, intervenor in another, and respondent in a third. Additional respondents were the ILA Hampton Roads District Council; the ILA Atlantic Coast District Council; the ILA District Council, Baltimore, Maryland; ILA Locals 333, 846, 862, 921, 953, 970, 1248, 1355, 1416, 1416-A, 1429, 1458, 1526, 1526-A, 1624 1680, 1736, 1783, 1784, 1819, 1840, 1922, and 1970, AFL-CIO; the Hampton Roads Shipping Association; Southeast Florida Employers Port Association; Coordinated Caribbean Transport, Inc.; Chester, Blackburn & Roder, Inc.; Eagle, Inc.; Eller & Company, Inc.; Harrington & Company, Inc.; Strachen Shipping Company; and Marine Terminals, Inc. The American Trucking Association, Inc., Tidewater Motor Truck Association, the New York Shipping Association, and the Council of North Atlantic Shipping Associations appeared as petitioners and intervenors below. The International Association of NVOCCs; Florida Custom Brokers and Forwarders Association, Inc.; Twin Express, Inc.; and International Container Express, Inc., were petitioners below. Houff Transfer, Inc.; the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America; the American Warehousemen's Association; and San Juan Freight Forwarders, Inc., were intervenors below. Under Rule 19.6 of the Rules of this Court, all of these parties are respondents in this Court.

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No. 84-861

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a)[1] is reported at 734 F.2d 966. The decision and order of the National Labor Relations Board (Pet. App. 35a-64a) and the decision of the administrative law judge (Pet. App. 65a-258a) are reported at 266 N.L.R.B. 230.

[1] "Pet. App." refers to the appendix filed jointly by the petitioners in Nos. 84-677, 84-686, 84-691, and 84-696.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1984. A petition for rehearing was denied on July 31, 1984 (Pet. App. 31a-34a). On October 19, 1984, the Chief Justice extended the time in which to file a petition for a writ of certiorari to and including November 28, 1984. The petition was filed on that date and granted on January 21, 1985 (J.A. 260). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(b) of the National Labor Relations Act, 29 U.S.C. 158(b), provides in part:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease

> doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing * * *.

Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), provides in part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforc[ea]ble and void * * *.

STATEMENT

This case concerns the Rules on Containers, which are part of collective bargaining agreements between the International Longshoremen's Association (ILA) and shipping industry employers. The Rules on Containers were adopted in response to a technological innovation in the shipping industry known as containerization and are designed to deal with the im-

pact of that innovation on longshoremen's work. In *NLRB* v. *ILA* (*ILA I*), 447 U.S. 490 (1980), this Court vacated two decisions[2] of the National Labor Relations Board that had concluded that the Rules on Containers and their enforcement constitute secondary activity prohibited by Sections 8(b)(4) and 8(e) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(b)(4) and 158(e). On remand, the Board consolidated those two proceedings with seven other proceedings[3] concerning the Rules on Containers. The Board concluded that the Rules violate the NLRA in their applications to a widespread practice known as shortstopping and to certain traditional warehousing practices. The Board also concluded that the Rules are otherwise lawful. The court of appeals, disagreeing with the Board in part, held that the Rules are lawful in all respects.

A. The Factual Background

1. *Containerization and its Effect on Longshore Work*

Containerization is a technological innovation that permits individual pieces of cargo to be packed into a large, reuseable metal container that can be moved on and off an ocean vessel unopened. Containers range in length from 20 to 40 feet and are capable of holding upwards of 30,000 pounds of freight. Containers can be fixed to a truck chassis and transported unopened to and from the ocean pier, and they fit into the holds of specially designed vessels known

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[2] *ILA (Dolphin Forwarding, Inc.)*, 236 N.L.R.B. 525 (1978), remanded, 613 F.2d 890 (D.C. Cir. 1979); *ILA (Associated Transport, Inc.)*, 231 N.L.R.B. 351 (1977), remanded, 613 F.2d 890 (D.C. Cir. 1979).

[3] See pages 14-17 and notes 6-7, *infra*.

as containerships. Pet. App. 45a; *ILA I*, 447 U.S. at 494. The loading of containers, by whomever performed, is known in the industry as "stuffing"; the unloading of containers is known as "stripping." *ILA I*, 447 U.S. at 497. Containers that contain export cargo belonging to more than one shipper or import cargo destined for more than one consignee are known as LCL (less-than-container load) or LTL (less-than-trailer-load) containers. Containers that contain export cargo from only one shipper or import cargo destined for only one consignee are known as FSL (full shipper's load) containers. *Id.* at 496-497.

Before containerization, longshoremen employed by steamship companies performed the work of loading and unloading cargo from ships at the piers. In the Atlantic and Gulf ports concerned in this case, longshoremen are represented by the International Longshoremen's Association (ILA). The longshoremen handled export cargo by moving it from the tailgate of the delivery truck at the pier into the hold of the vessel, using forklifts and slings or hooks; they performed this work in reverse in unloading import cargo. The process of handling cargo on the pier included intermediate steps such as storage, sorting, checking, placing cargo on pallets, cargo repair, and carpentry. *ILA I*, 447 U.S. at 495; Pet. App. 4a-5a, 46a; J.A. 150-152, 195-197.

The growth of containerization greatly reduced the traditional loading and unloading work performed by longshoremen. Containers eliminated the need for piece-by-piece (or "break-bulk") cargo handling at the pier. *ILA I*, 447 U.S. at 495-496; Pet. App. 46a. Export containers were stuffed before they reached the pier; import containers were stripped after they left the pier. With respect to containerized cargo, it

remained only for longshoremen to take the containers on and off the vessel. Longshoremen continued to load and unload conventional cargo vessels in the traditional manner, to stuff containers with cargo that arrived at the pier piecemeal, and to strip containers of cargo scheduled to be picked up at the pier directly. Pet. App. 46a-47a; J.A. 53-54, 154-155, 195-197.

2. *Cargo Handling by Motor Carriers, Employees at Inland Warehouses, and Freight Consolidators, Before and After Containerization*

Shipping companies own or lease virtually all containers carried on ocean vessels. They furnish these containers principally to the shippers (or consignees) themselves and to three kinds of firms that serve as agents for the shippers and consignees: motor carriers, warehouses, and freight consolidators.

a. Motor carriers operate between inland points and the motor carrier's terminal in the pier area and also between the terminal and the pier (Pet. App. 46a, 54a, 132a-133a; J.A. 8-9, 25-27, 63-65). Before containerization, the motor carrier picked up import cargo break-bulk from the pier. Most commonly, the driver returned to the truck terminal in the pier area where the motor carrier's employees unloaded the trailer and then loaded the cargo into different trucks for delivery to the consignees (J.A. 8, 25-27, 63-65, 111-112). Even when the cargo was a full trailer load sent to a single consignee, it was usually taken to the terminal and reloaded for several reasons—to achieve proper weight distribution for a long haul run, to meet road safety standards, to allow sequential unloading, or to permit delivery of the cargo to diverse inland locations in accordance with the consignee's directions (Pet. App. 54a; J.A. 6-7, 25-27, 64, 90).

Motor carriers now haul empty and filled containers between the pier and their off-pier terminals, as well as to various other inland locations including warehouses and facilities of shippers and consignees. A carrier that handles import FSL containers—as many do exclusively or predominantly (J.A. 6, 10, 90-91, 127-128)—picks up a sealed FSL import container from the pier, hitches the container to the truck, and hauls it to the motor carrier's off-pier terminal (J.A. 27, 89-90, 113, 201, 216, 219-220, 224-225, 228). At the off-pier terminal, the carrier may treat the container in the same way that it previously treated a truckload of break-bulk cargo picked up from the pier and destined for a single consignee—it may either leave the container intact for delivery to the consignee or strip the container and reload the cargo into an over-the-road truck trailer. The practice of stripping FSL loads prior to delivery to a single consignee is known as "shortstopping." Pet. App. 27a, 54a-55a, 133a-134a; J.A. 6-7, 27-28, 91-93, 128-131, 205-207, 226-227.

Trucking companies shortstop containers for a variety of reasons arising from the requirements of surface transportation and at no extra charge to the consignee. Like trailer loads of break-bulk cargo picked up from the pier in the pre-container era, fully loaded containers may exceed state highway weight limitations or be overloaded, unbalanced, or otherwise unsuitable for hauling long distances (Pet. App. 55a, 134a; J.A. 9-10, 29, 117-118, 129-131, 206-210, 212-213, 222, 225-227). Containers also may be incompatible with conventional truck tractor equipment used for long-distance hauling. It is often more efficient to consolidate the contents of two 20-foot containers into one 45-foot truck trailer. And by using

their own trailers instead of containers, trucking companies can carry revenue-producing cargo on the return trip while at the same time avoiding maintenance costs and per diem charges on containers. Pet. App. 55a, 134a; J.A. 6, 27-28, 69, 92, 98, 115-116, 118, 207, 208-209, 216-217, 222, 229-230.

b. Inland warehouses store cargo for indefinite periods and distribute the cargo according to the owner's instructions; this enables the owner to meet the shifting or unexpected demands of its customers or the branches of its operation without having the cargo shipped to its central plant unnecessarily. Importers arrange with the warehouse to pick up cargo at the pier. Upon delivery of import cargo to the warehouse, warehouse employees, before containerization, unloaded the truck, sorted, segregated, and palletized the cargo, and placed it in designated storage areas. There it was stored until the consignee instructed the warehouse to distribute or deliver all or a portion of the cargo either to the consignee or to a designated customer or branch outlet of the consignee (Pet. App. 55a-56a; J.A. 96-97). In some cases, stored crates or cases of cargo were broken down and individual pieces of merchandise were delivered as directed by the consignee (J.A. 96-97).

Since containerization, warehouse employees, instead of stripping truck trailers filled with import cargo, have stripped containers that have been picked up from the pier and delivered unopened to the warehouse. The warehouse employees then perform the same tasks as before containerization—they sort, label, and place the cargo on pallets in order to store it in a designated location to await the owner's instructions on distribution (J.A. 15-16, 54-56, 67-69, 96-99).

Some warehouses also provide warehousing services for export cargo sent by a single shipper. For example, before containerization, one warehouse involved in this litigation stored small lots of cargo for later consolidation and shipment with additional cargo sent by the same shipper (Pet. App. 144a n.58; J.A. 98). Another warehouse picked up merchandise from a customer's manufacturer and assembled truckloads of cargo for each of the customer's overseas branch outlets (Pet. App. 144a n.58; J.A. 43-45). Since containerization, warehouses have continued to perform the same services, although now they combine designated stored cargo for shipment in FSL containers (Pet. App. 144a n.58; J.A. 15-16, 43-44, 53, 98-99). In connection with stuffing FSL export containers, warehouses also may perform specialized services for handling and packing cargo (Pet. App. 126a n.46; J.A. 105-109, 121-123).

c. Freight consolidators combine goods of various shippers in a single shipment at an off-pier terminal and deliver the consolidated shipment to the pier (*ILA I*, 447 U.S. at 496 n.8; Pet. App. 52a-53a, 124a n.43; J.A. 134). The extensive scale of off-pier stripping and stuffing—particularly the operations of freight consolidators known as non-vessel operating common carriers (NVOCCs)—has been encouraged by a rate structure under which shipping companies charge less for transporting a shipper's cargo when it has been combined with other shippers' cargo in a single container than they would charge for transporting that same cargo delivered to the pier in break-bulk fashion to be stuffed into a container at the pier (Pet. App. 127a-129a; J.A. 16-18, 77-78, 120, 134). In addition, shippers frequently seek to avoid having cargo handled in break-bulk fashion at the pier because, among other things, there is a

greater danger of pilferage and damage (see *ILA I*, 447 U.S. at 494; J.A. 56, 99, 121).

3. *The Rules on Containers*

Although the first ship specifically designed to handle containers appeared in 1957, and containers and their forerunners had appeared years earlier, it was not until the late 1960's that containerized cargo became a significant portion of the North Atlantic trade (*ILA I*, 447 U.S. at 497, n.11; Pet. App. 5a-9a, 96a, 98a, 100a & n.26; J.A. 66, 155, 161). The increased use of containers led the ILA to negotiate the initial version of the Rules on Containers as part of its 1968 collective bargaining agreement with the New York Shipping Association (NYSA), a multi-employer group of shipping and stevedoring companies operating in the port of New York (Pet. App. 9a-10a; J.A. 160-162). The agreement, which was settled only after a 57-day strike, applied only to LCL containers—those containing export cargo belonging to more than one shipper or import cargo destined for more than one consignee (Pet. App. 9a-10a, 99a-100a, 207a-211a; J.A. 162-163). The 1968 Rules provided that LCL containers could be stuffed or stripped within a 50-mile radius of the port only by longshoremen at the pier and assessed liquidated damages for each violation of this proscription. The 1968 Rules did not affect LCL containers stuffed or stripped beyond the 50-mile area and placed no restriction on FSL containers—those containing cargo owned by a single shipper or consignee. Pet. App. 9a-10a, 99a, 100a, 207a-211a. After another coast-wide strike, the rules were renewed in 1971 with only minor modifications and an increase to $1,000 in the liquidated damages assessed for each violation (Pet. App. 10a, 101a-102a, 212a-213a; J.A. 166-167).

The Rules were modified to their current form in 1973 by the so-called "Dublin agreement" between the ILA and the Council of North Atlantic Shipping Associations (CONASA), a multi-employer group of shipping associations (including NYSA) whose members are shipping and stevedoring companies operating in Atlantic Coast ports (Pet. App. 10a-11a, 102a-103a, 214a-215a; J.A. 149-150, 168-169). The Dublin agreement extended the Rules to FSL containers, specifying that they, too, must be stuffed and stripped within the 50-mile radius only by longshoremen at the pier. Exceptions were made for FSL containers stuffed or stripped by the beneficial owner of the cargo (a single shipper or a single consignee) or by a warehouse storing the cargo for more than 30 days. Pet. App. 10a-11a, 103a, 215a-216a.[4] The Dublin agreement maintained the $1,000 liquidated damages assessment for each violation of this proscription. In their current form, the Rules require shipping companies to deny containers to any facility that is operating in violation of the Rules. *Id.* at 10a-11a, 103a, 218a.[5]

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[4] Exceptions are also made for containers carrying personal household goods, mail, and the personal effects of military personnel, and for containers carrying cargo in the intercoastal trade (Pet. App. 225a-226a).

[5] For the purpose of this case, the Rules in their essentially final form appeared in the 1974-1977 agreement negotiated by ILA and CONASA, as clarified by a restatement pertaining to warehousing of goods issued in 1975 (Pet. App. 11a, 87a, 103a-104a, 106a n.29, 232a-234a; J.A. 240-242). The text of the rules reprinted in the appendix to the Court's opinion in *ILA I* (447 U.S. at 513-522) is the 1974-1977 version as amended by the 1975 clarifying statement, and it resembles in all significant respects the Rules as incorporated in the parties' agreement negotiated in 1980 (Pet. App. 103a-104a, 237a-238a).

The Dublin agreement modifications were designed to claim for the ILA the stuffing and stripping of FSL containers in connection with shortstopping and certain traditional warehousing practices (see Pet. App. 10a-11a, 102a-103a; J.A. 167-169, 184, 240-242). These are the applications of the Rules that are now in issue before this Court.

B. *ILA I*

Initially, however, the Board concluded that the Rules, and the ILA's effort to enforce them, violated Sections 8(b)(4)(B) and 8(e) in all respects. The Board reasoned that the objective of the Rules in all their applications was not to preserve the work of bargaining unit employees but to acquire work that had been performed by employees outside the bargaining unit. See *NLRB* v. *Enterprise Ass'n of Pipefitters*, 429 U.S. 507, 517 (1977); *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612, 644-645 (1967). In *ILA I*, this Court ruled that the Board's definition of the work at issue—" 'the off-pier stuffing and stripping of containers' " (447 U.S. at 506; citation omitted)—was "incorrect as a matter of law" (*id.* at 507) because the Board "focused on the work done by the employees of the charging parties, the truckers and consolidators, after the introduction of containerized shipping" (*ibid.*). The Court held that "the Board must focus on the work of the bargaining unit employees, not on the work of other employees who may be doing the same or similar work" (*ibid.*).

The Court declined to address the question whether the Rules have a valid work preservation objective, however, because the Board has "not had an opportunity to consider th[is] question[] in relation to

a proper understanding of the work at issue." 447 U.S. at 511. The Court explained the issue as follows (*id.* at 510-511; footnote omitted):

> [The ILA and the shipping companies] assert that the stuffing and stripping reserved for the ILA by the Rules is functionally equivalent to their former work of handling break-bulk cargo at the pier. [The freight consolidators, truckers and warehouses], on the other hand, argue that containerization has worked such fundamental changes in the industry that the work formerly done at the pier by both longshoremen and employees of motor carriers has been completely eliminated.
>
> These questions are not appropriate for initial consideration by reviewing courts. They are properly raised before the Board, whose determinations are, of course, entitled to deference. * * * We emphasize that neither our decision nor that of the Court of Appeals implies that the result of the Board's reconsideration of this case is foreordained. Viewing the work allegedly to be preserved by the Rules from the proper perspective, the Board will be free to determine whether the Rules represent a lawful attempt to preserve traditional longshore work, or whether, instead, they are "tactically calculated to satisfy union objectives elsewhere," *National Woodwork*, 386 U.S., at 644.

The Court emphasized the limited nature of its ruling (447 U.S. at 511 n.26): "Our holding, we repeat, is that the Board's definition of the work in controversy was erroneous as a matter of law. The question whether the Rules may be sustained under a proper understanding of the work preservation doctrine must be answered first by the Board on remand."

C. The Board's Decision and Order on Remand

1. *The Cases Before the Board on Remand*

The Board consolidated the two cases remanded by *ILA I* with seven other cases involving the legality of the Rules. In several of these cases, the Board upheld applications of the Rules, finding that they had a valid work preservation objective; these rulings by the Board are not now in issue before this Court. In particular, in four cases the Board found that the Rules have a valid work preservation objective as applied to prohibit freight consolidators from stuffing and stripping containers within the 50-mile radius.[6]

Now at issue before this Court are the Board's findings that the Rules do not have a valid work preservation objective, and are therefore unlawful, as applied in three cases: as applied to prohibit motor carriers from shortstopping FSL containers (*Associated Transport*); as applied to prohibit a warehouse from stripping FSL containers as part of its traditional work of storing and distributing import goods (*Terminal Corp.*); and as applied to prohibit a warehouse from stuffing FSL containers as part of its traditional work of collecting, storing, and preparing for shipment export goods (*Beck Arabia, Ltd.*).[7]

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[6] *ILA (Consolidated Express, Inc.)*, 221 N.L.R.B. 956 (1975), enf'd, 537 F.2d 706 (2d Cir. 1976), cert. denied, 429 U.S. 1041 (1977), judgment vacated Oct. 1, 1980 (2d Cir. 1980); *ILA (Dolphin Forwarding, Inc.)*, 236 N.L.R.B. 525 (1978), remanded, 613 F.2d 890 (D.C. Cir. 1979), affirmed, *ILA I*, 447 U.S. 490 (1980); *ILA (Puerto Rico Marine Management, Inc.)*, 245 N.L.R.B. 1320 (1979); *ILA (American Trucking Ass'ns, Inc.)*, complaint dismissed, No. 22-CE-44 (Feb. 28, 1983); Pet. App. 60a, 173a-175a, 192a.

[7] The Board found no violation where the Rules were applied to prohibit warehouse employees within the 50-mile radius from stuffing FSL containers where this work was not integral to any specialized warehousing service. *ILA (The Terminal Corp)*, 250 N.L.R.B. 8 (1980), Pet. App. 143a, 180a-181a (stuffing FSL export containers).

The Board also found that the Rules have a valid work preservation objective as applied to prohibit warehouse employees from stripping containers within the 50-mile radius where the particular work in question had previously been performed by longshoremen at the pier. *Hill Creek Farms, Inc.*, No. 4-CC-1133 (Feb. 28, 1983), Pet. App. 142a-143a, 176a-179a (stripping of refrigerated containers previously performed by longshoremen at the pier). Finally, the Board found the application of the rules unlawful where they were "invoked in quest of organization of other employees * * * not represented by ILA." Pet. App. 186a; *Custom Brokers and Forwarders Ass'n*, No. 12-CE-30 (Feb. 28, 1983). Enforcement of the Board's order in this respect was not contested before the court of appeals and is not at issue here.

a. *Shortstopping* (Associated Transport)

As recounted in *ILA I*, Houff Transport, Inc. (Houff) and Associated Transport, Inc. (Associated) were common carriers that operated motor freight terminals within 50 miles of the Ports of Baltimore and Hampton Roads. *ILA I*, 447 U.S. at 501; *ILA (Associated Transport, Inc.)*, 231 N.L.R.B. 351, 358 (1977), remanded, 613 F.2d 890 (D.C. Cir. 1979), affirmed, 447 U.S. 490 (1980). In 1974, employees of Houff and Associated stripped FSL containers they had picked up at piers in the nearby ports and loaded the cargo into trailers for over-the-road transport to the consignees. Both Houff and Associated stripped the containers because they were clearly overweight. *ILA I*, 447 U.S. at 501; *Associated Transport*, 231 N.L.R.B. at 362; J.A. 28, 205-206, 221-222. The shipping companies that released the containers to Houff and Associated were subsequently assessed liquidated damages under the

Rules for each container, and when Houff and Associated refused to indemnify the companies for the fines, the companies cancelled the agreements under which Houff and Associated obtained the containers. *ILA I*, 447 U.S. at 501; *Associated Transport*, 231 N.L.R.B. at 362-363; J.A. 28, 183, 245-248.

b. *Stripping of FSL containers by warehouse employees integral to distribution and storage of imported merchandise for a single owner* (Terminal Corp.)

The Terminal Corporation is a bona fide warehouse within the meaning of the Rules operating within 50 miles of the Port of Baltimore. In 1978 and 1979, Terminal received FSL containers of firebrick from a German manufacturer as part of a continuing arrangement. According to the usual practice, German employees stuffed the containers, ILA labor in Baltimore unloaded them from the ship, and Terminal drivers attached the containers to tractors and drove them to the warehouse. Other Terminal employees then stripped the containers, separating out the firebrick already sold for distribution and storing the rest for future distribution pursuant to the instructions of the manufacturer. Stored firebrick was sometimes distributed in less than 30 days and sometimes held for more than 30 days, depending on the manufacturer's orders. *ILA* (*Terminal Corp.*), 250 N.L.R.B. 8, 10-11 (1980); Pet. App. 179a; J.A. 250-252.

In March 1979, agents of the ILA, its Atlantic Coast District, and two ILA locals induced members employed by a stevedoring contractor to engage in a temporary refusal to release containers of firebrick to Terminal because the shipping papers did not contain the 30-day warehousing language required by

the Rules. *ILA* (*Terminal Corp.*), 250 N.L.R.B. at 11; Pet. App. 179a-180a.

c. *Stuffing of FSL containers by warehouse employees integral to special services respecting goods for export by a single owner* (Beck Arabia, Ltd.)

Beck Arabia, Ltd., is engaged in various construction projects in Saudi Arabia; from its offices in Texas it orders a variety of items from a number of American suppliers for use in the Saudi projects. Under a continuing arrangement between Beck and Shipside Packing Company, a firm that maintains a general warehouse and packing operation within 50 miles of the Port of Baltimore, Beck's suppliers send the items to Shipside, which stores them temporarily until receiving orders from Beck to consolidate particular groups of items for shipment on specified vessels. Shipside employees then stuff FSL containers for delivery to the pier by contract motor carriers. In August 1978, an agent of an ILA local induced ILA members employed by a stevedoring company to refuse to load the containers onto a ship because the ILA regarded their stuffing by non-ILA labor to be a violation of the Rules. *ILA Local 953* (*Beck Arabia, Ltd.*), 245 N.L.R.B. 1325 (1979); Pet. App. 181a-182a.

2. *The Board's Decision and Order*

The administrative law judge concluded that the Rules were invalid insofar as they applied to shortstopping and container stripping and stuffing integral to traditional warehousing practices. The ALJ concluded that the Rules were valid in other respects. The ALJ described the practice of shortstopping as follows (Pet. App. 133a-134a; emphasis in original):

By virtue of this practice, FSL containers are stripped at truck stations and terminals within the geographic area covered by the Rules for a variety of reasons associated with the economics of *surface* transportation. * * * Over-the-road tractor-trailers are up to 45 feet in length, and therefore have a capacity exceeding that of the modern containers. Interstate carriers will upon occasion strip the smaller containers, consolidate the cargo they contain with other goods destined for the same area and load the consolidated cargo into a 45 foot tractor-trailer. In addition, many interstate carrier systems interchange trailers at inland points for use within a multistate system. Containers have no utility within that system and if transported over the road, would have to be hauled empty back to the port area * * *. Short-stopping may also occur because containers may not have been loaded in a safe manner or in compliance with State laws regulating safety of operation on the highways. Other grounds for short-stopping include the fact that [a] motor carrier is required to pay *per diem* charges on containers, a practice which is wasteful while empty trailers sit idle and are subject to utilization without additional operating cost.

On the basis of these findings, the ALJ concluded that "the practice of short-stopping is rooted in traditional motor carrier transport cargo handling procedure, which is performed by motor carriers for their own benefit and convenience * * * [and] has no relevance to the marine leg of the intermodal network" (Pet. App. 134a). The ALJ explained that "[a]lthough skills utilized [in stripping containers in the course of shortstopping] are indistinct from those of deepsea longshoremen in the performance of

their traditional duties, it is work assumed for a different purpose, and in a different segment of the transportation industry. Shortstopping is simply a carrier oriented, as distinguished from consumer oriented service, and as such neither competes with marine cargo handling nor amounts to a subterfuge to oust longshoremen of their traditional work" (*id.* at 134a-135a).

The ALJ similarly determined that the Rules were unlawful as applied to traditional warehousing practices (Pet. App. 138a):

> [T]he public inland warehouse has always provided an intermediate freight distribution service whereby cargo could be stored for a term dictated by the owner's market demand.
>
> To this extent, warehousing practices did not change after containerization. Instead of stripping truck-trailers upon arrival at the warehouse docks, the container was stripped.

The ALJ upheld the Rules, however, insofar as they applied to freight consolidators, including both NVOCCs and warehouses that function not in their traditional role but as freight consolidators (Pet. App. 123a-132a, 139a-145a). The ALJ reasoned that "if consolidation in containers is to be performed within the port area, it just as conveniently could be performed on the pier by longshoremen" (*id.* at 131a). The ALJ accordingly concluded that insofar as the Rules claim the off-shore stripping and stuffing performed by NVOCCs within 50 miles of the port, they "constitute[] a rational effort to return to the piers, work diverted by inducements and * * * technology" (*id.* at 129a-130a).

The Board "agree[d] with the Administrative Law Judge's findings and conclusions" (Pet. App. 57a).

The Board explicitly defined "the work in dispute" as "the initial loading and unloading of cargo within 50 miles of a port into and out of containers owned or leased by shipping lines having a collective-bargaining relationship with the ILA" (*ibid.*). The Board noted that "no new work was created for consolidators after containerized shipping began" (*id.* at 59a). Instead, a "large part of the longshoremen's traditional work was diverted away from the pier to the consolidators" (*ibid.*). The Board accordingly concluded that "the ILA had a lawful work preservation objective in claiming this work under the Rules" (*ibid.*).

The Board modified the ALJ's rationale for concluding that the Rules were unlawful as applied to shortstopping and traditional warehousing functions, but it agreed with his conclusion (Pet. App. 59a):

> The Administrative Law Judge also found that no new work was created by containerization for trucking and warehousing employees. Further, in contrast to consolidation, no work was diverted away from the pier to the truckers and warehouses as a result of containerization, at least as to those shortstopping and traditional warehousing services involved where he found violations. Rather, after containerization, some of the traditional loading and unloading work of the longshoremen, which had historically been duplicated by trucking and warehousing employees, essentially was eliminated. While we agree with the Administrative Law Judge's conclusion that the ILA had an unlawful work acquisition objective in claiming this loading and unloading work * * *, we do not agree with his reliance on the fact that the work now done by the truckers and warehouses is work which was not created by containerization. Instead, we point to the fact that, because of the efficiency of the new technology, the duplicative work of the longshoremen, in handling cargo which is then rehandled by truckers and warehouses, no longer exists as a step in the cargo-handling process. * * *

D. The Decision of the Court of Appeals

The court of appeals held that "the Rules are valid in all respects" (Pet. App. 4a). It accordingly sustained the Board's order insofar as it upheld the lawfulness of the Rules, but denied enforcement of the order insofar as it held unlawful the application of the Rules to shortstopping and certain warehousing practices.

The court held (Pet. App. 27a) that the Board erred as matter of law when it concluded that, because the Rules as applied to shortstopping and traditional warehousing practices "sought to preserve for the longshoremen work that had been rendered superfluous by the change in technology and not work that had been diverted to others," the Rules violated the Act in those applications. The court of appeals acknowledged that containerization had essentially not altered the truckers' work and had made the longshoremen's work unnecessary (*ibid.*):

> Prior to containerization, both the longshoremen and the truckers handled the break-bulk cargo as it moved from the ship to the consignee. * * * With containerization, the off-pier work of the shortstopping truckers remains essentially unchanged except that they unload cargo from containers instead of from motor trucks. And with containerization, of course, the work formerly performed by the longshoremen

had been rendered unnecessary because the container can be fastened to the chassis of a truck and transported intact to the trucking terminal or freight station.

Nonetheless, the court of appeals ruled that the Board's conclusion that the application of the Rules to shortstopping does not have a valid work preservation objective was erroneous for the following reason (Pet. App. 27a-28a; emphasis in original):

> [T]he Board conspicuously failed to ground this conclusion * * * in the only finding of fact that might support it: that the Rules, in preserving for ILA members the right to do this initial loading and unloading somehow deprive the truckers and warehousemen of *their* off-pier work by transferring all or some of it to longshoremen at the pier. Put another way, the Board hung the "work acquisition" tag on the Rules in these two instances without a finding that the longshoremen acquired anything. * * * [O]ne cannot possibly maintain that the stripping of import containers at the pier would in any way prevent the identical off-pier work. To repeat, truckers and warehousemen do precisely what they did before the change in technology; the longshoremen have acquired none of that work. Although the longshoremen's work in this process may well duplicate the off-pier work of truckers and warehousemen, calling this set of circumstances "work acquisition" strikes us as particularly inappropriate.[8]

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[8] The court of appeals did not discuss in detail the application of the Rules to traditional warehousing practices but asserted that "the Board made the identical error of law with regard to both shortstopping and warehousing" (Pet. App. 27a n.8).

Three judges of the court of appeals voted to rehear the case en banc (Pet. App. 33a).

SUMMARY OF ARGUMENT

The Rules on Containers require shipping companies to cease doing business with persons that permit the stuffing or stripping of containers in violation of the Rules. Consequently, Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), if interpreted literally, would unquestionably make the Rules on Containers unlawful. This Court has held, however, that Section 8(e) permits agreements that have the purpose of preserving work traditionally performed by the contracting employees.

In *ILA I*, the Court explained that the question whether the Rules on Containers have a lawful work preservation objective depends on whether the Rules are "tailored * * * to the objective of preserving the essence of traditional work patterns" (447 U.S. at 510 n.24). The Court instructed the Board to resolve this issue by undertaking "a careful analysis of the traditional work patterns that the [Rules] are allegedly seeking to preserve" (*id.* at 507) in order to determine "whether the historical and functional relationship between this retained work and traditional longshore work can support the conclusion that the objective of the agreement was work preservation" (*id.* at 510).

The Board undertook the analysis of traditional work patterns mandated by this Court. The Board ruled that freight consolidators (who primarily assemble LCL containers) perform work that historically and functionally is indistinguishable from the traditional work of longshoremen; the Board accordingly upheld the application of the Rules to

freight consolidators, and that aspect of the Board's decision is not now in issue. But the Board also concluded that, historically and functionally, shortstopping is not an aspect of traditional longshore work but is instead integral to the movement of cargo by motor carrier. The unloading of FSL containers done in connection with shortstopping is undertaken for reasons related to motor transport, not longshore work, and has never been performed by longshoremen. The Board similarly concluded that stuffing and stripping of FSL containers done in connection with certain traditional warehousing functions is an aspect of the traditional work pattern of warehouse employees, not longshoremen.

The court of appeals did not quarrel with any of these determinations. Nor did the court suggest that the Board had not carried out the task specified by this Court in *ILA I*. Instead, the court of appeals overturned the Board's ruling, insofar as it invalidated the Rules, solely because the Board had not found that the application of the Rules to shortstopping and the warehousing practices would deprive other employees of their work.

The court of appeals' unsubstantiated conclusion that the Rules would not operate to deprive other employees of their work flies in the face of economic reality. But even if that conclusion were true, it is immaterial whether the Rules deprive other employees of their work. As the name of the work preservation doctrine itself suggests, and as the Court has emphasized in each of its decisions dealing with that doctrine—especially *ILA I*—the question is not whether the Rules deprive other employees of their work but whether the work claimed by the Rules is "traditional longshore work" (*ILA I*, 447 U.S. at

509). The Board concluded that shortstopping and stuffing and stripping of FSL containers in connection with certain warehousing activities are not traditional longshore work, and the court of appeals nowhere explained why these conclusions are unreasonable.

Moreover, the court of appeals failed to take account of the Board's explicit finding that certain break-bulk loading and unloading work formerly done by longshoremen in connection with FSL loads has been eliminated by containerization. Indeed, in the course of collective bargaining on the effects of containerization, the ILA did not attempt to claim work in connection with FSL loads until the Dublin modifications; then it specifically claimed the work done in connection with shortstopping and traditional warehousing functions. But the ILA was not free to attempt to compensate for the work that was eliminated by acquiring work that—as the Board reasonably determined—has not traditionally been performed by longshoremen.

ARGUMENT

THE COURT OF APPEALS ERRED IN OVERTURNING THE BOARD'S DETERMINATION THAT THE APPLICATION OF THE RULES TO SHORTSTOPPING AND CERTAIN TRADITIONAL WAREHOUSING PRACTICES CONSTITUTES UNLAWFUL SECONDARY ACTIVITY

1. By its terms, Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), prohibits employers and unions from agreeing that the employer will cease doing business with another person. See, *e.g.*, *NLRB* v. *Enterprise Association of Pipefitters*, 429 U.S. 507, 517 (1977). If Section 8(e) were interpreted liter-

ally, the Rules on Containers would unquestionably be unlawful: they require shipping companies not to supply containers to other persons, unless those persons permit the containers to be stuffed and stripped by employees represented by the ILA under the circumstances specified in the Rules. This Court has held, however, that Section 8(e) applies only to secondary activity, not to activity serving a legitimate primary purpose. See *ILA I*, 447 U.S. at 504; *Pipefitters*, 429 U.S. at 517; *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612, 620 635 (1967).[9]

"Among the primary purposes protected by the Act is 'the purpose of preserving for the contracting employees themselves work traditionally done by them.' " *ILA I*, 447 U.S. at 504, quoting *Pipefitters*, 429 U.S. at 517; see *National Woodwork*, 386 U.S. at 629. As the Court has explained, an agreement does not have a legitimate work preservation objective—and is instead unlawful under Section 8(e)—if its "object * * * [is] not to preserve, but to aggrandize, [a union's] own position and that of its members" (*Pipefitters*, 429 U.S. at 530 n.16). A union may not "seek[] to restrict by contract or boycott an employer with respect to the products he uses, for the purpose of acquiring for its members work that had not pre-

[9] The Court has arrived at this construction of Section 8(e) by interpreting it "*pari passu*" with Section 8(b)(4)(B) of the NLRA, 29 U.S.C. 158(b)(4)(B) (*National Woodwork*, 386 U.S. at 649 (Harlan, J., concurring)), which contains a proviso explicitly excepting "any primary strike or primary picketing" from its prohibitions. A union violates Section 8(b)(4)(B) if it applies pressure in an effort to enforce a provision of a collective bargaining agreement that violates Section 8(e).

viously been theirs." *National Woodwork*, 386 U.S. at 648 (Harlan, J., concurring); see *id.* at 630-631.

Accordingly, as the Court explained in *ILA I*, the question in this case is whether the Rules on Containers are "tailored * * * to the objective of preserving the essence of traditional work patterns" (447 U.S. at 510 n.24) and thus "seek[] no more than to preserve the work of bargaining unit members" (*id.* at 507), or instead seek to "aggrandize" the ILA's position by "acquiring for its members work that had not previously been theirs." The Court remarked in *ILA I* that in its previous cases dealing with the work preservation doctrine—*National Woodwork* and *Pipefitters*—the task of determining the nature of traditional bargaining unit work was "relatively simple" (447 U.S. at 507). But "[t]his case presents a much more difficult problem" (*id.* at 509-510), because containerization—the innovation to which the Rules are addressed—has worked the "transformation of several interrelated industries [and] types of work" (*id.* at 507). In other words, in determining the lawfulness of the Rules the Board has been faced with the task of assessing the extent to which the Rules preserved "the essence of traditional work patterns" in a setting in which work patterns have been radically altered by containerization.

The Court in *ILA I* enjoined the Board to perform this task by conducting "a careful analysis of the traditional work patterns that the parties are allegedly seeking to preserve" (447 U.S. at 507) that focuses on the "historical and functional relationship between the retained work and traditional longshore work" (*id.* at 510). The Court in *ILA I* made it abundantly clear that the Board's resolution of this complex issue is entitled to substantial deference (see *id.* at 511 & n.26).

2. In determining the extent to which the Rules preserve "the essence of traditional work patterns," the Board distinguished between freight consolidation, on the one hand, and shortstopping and certain traditional warehousing practices, on the other. Specifically, as we have explained, the Board concluded that the Rules are lawful as applied to freight consolidation but are unlawful as applied to shortstopping and the traditional warehousing practices. The court of appeals refused to enforce the Board's order only insofar as it declared unlawful the application of the Rules; thus, only the Board's rulings with respect to shortstopping and the traditional warehousing practices are now before this Court. Nevertheless, we will discuss the Board's determination that the Rules are lawful as applied to freight consolidation in order to provide the larger context of the Board's rationale and demonstrate the reasonableness of its particular conclusions on the two limited questions at issue here.

a. Freight consolidators deal primarily with LCL containers—that is, containers holding cargo sent by more than one shipper. Before containerization, shippers delivered cargo in break-bulk to the pier, where longshoremen loaded it into the hold of a ship; now, break-bulk cargo may be delivered not to the pier but to the inland terminals of NVOCCs and other freight consolidators, who load it into containers that will be transferred into the holds of ships.

The Board concluded that the freight consolidators' work "is functionally equivalent to [the longshoremen's] former work of handling break-bulk cargo at the pier" (*ILA I*, 447 U.S. at 510; footnote omitted). The Board reasoned that "no new work was created for consolidators after containerized shipping began.

Rather, a large part of the longshoremen's traditional work was diverted away from the pier to the consolidators" by containerization and other factors (Pet. App. 59a). The Board accordingly agreed with the ALJ's determination that the Rules—insofar as they prohibit freight consolidators from stuffing containers within 50 miles of the pier and require that the stuffing be done by ILA labor at the pier instead—constitute "a rational attempt to claim only the work * * * which had previously been performed on the pier by longshoremen" (*id.* at 53a).

b. The Board also concluded, however, that stuffing and stripping done in connection with shortstopping of FSL containers and certain traditional warehousing functions in respect of FSL loads stand on a different footing from freight consolidation and are not fairly claimable by the ILA. Before containerization, cargo destined for a single consignee was unloaded in break-bulk from the ship and onto a truck, which was driven a short distance to the carrier's inland terminal near the pier. There—even though the truck load was destined for a single consignee—employees of the motor carrier frequently shortstopped it; that is, they unloaded the cargo and reloaded it, in order to achieve the proper weight distribution, to meet safety standards, to allow for sequential unloading, or to permit delivery to diverse locations in accordance with the consignee's directions.

Containerized cargo destined for a single consignee (an FSL container) is taken from the hold and attached directly to a truck chassis, thus eliminating the initial break-bulk handling by ILA labor at the pier. From that point on, the FSL container is treated in the same fashion as a truckload of cargo

destined for single consignee was treated before containerization. The container is driven to the motor carrier's pier area terminal, where it is shortstopped for the same reasons that pre-containerization truckloads were shortstopped.

After conducting its analysis of "traditional work patterns" and "the historical and functional relationship between [shortstopping] and traditional longshore work" (*ILA I*, 447 U.S. at 507, 510), the Board concluded that shortstopping is not traditional longshore work but is instead "rooted in traditional motor carrier transport cargo handling procedure" (Pet. App. 134a). Shortstopping has traditionally been done by the employees of motor carriers, and it is done for purposes wholly distinct from the traditional purposes of longshoremen's work—specifically, for purposes integrally connected to movement by motor carrier, such as the need to satisfy weight or balance requirements or to obtain the most efficient use of trucks and trailers. Longshoremen have never performed loading or unloading work for these purposes. The Board reasonably concluded that the longshoremen could not claim this work—which is "historical[ly] and functional[ly]" (*ILA I*, 447 U.S. at 510) related to the work of motor carriers' employees, not longshoremen—just because the work may physically resemble longshoremen's work and require some of the same skills. See Pet. App. 134a-137a.

The Board further explained that as a result of containerization, some of the longshoremen's work of unloading FSL loads "essentially was eliminated" (Pet. App. 59a). FSL containers can pass over the pier intact and enter the land transportation network without being unloaded either by longshoremen or by

employees performing work that is the functional equivalent of traditional longshore work. Indeed, in the first collective bargaining agreement that regulated the use of containers, the ILA did not seek to restrict the stripping and stuffing of FSL containers at all. When the ILA subsequently, in the Dublin modification, asserted a right to strip and stuff some FSL containers, it did so by claiming certain specific work—the stripping and stuffing done in connection with shortstopping and traditional warehousing practices—that are no part of a longshoreman's traditional work. As we have explained, under *ILA I* and this Court's other decisions defining the work preservation doctrine, a union is not engaged in valid work preservation when it attempts, as the ILA has here, to alter, rather than preserve, "traditional work patterns" (447 U.S. at 507; *id.* at 510 n.24).

c. The Board's analysis of the warehousing functions paralleled its analysis of shortstopping. Before containerization, when a truckload of cargo for a single consignee was delivered to a warehouse, warehouse employees unloaded the truck, sorted, segregated, and palletized the cargo, and placed it in designated storage areas. The cargo remained there until the consignee instructed the warehouse to distribute all or a portion either to the consignee or to a designated customer or branch outlet of the consignee.

Since containerization, warehouse employees have performed precisely the same tasks, except that now instead of unloading trucks that were loaded by longshoremen they strip FSL containers that were loaded at the point of origin and have been delivered unopened to the warehouse.[10] Under the Rules, this

[10] Some warehouses provide similar services for export cargo sent by a single shipper. Thus, prior to containeriza-

stripping, too, must be done at the pier by ILA labor. The Board concluded that this application of the Rules is unlawful because traditional longshore work has been eliminated with respect to FSL containers that are stripped or stuffed in connection with the traditional warehousing functions; and the stripping and stuffing work that remains is associated with the traditional work patterns of warehouse employees, not longshoremen. See Pet. App. 55a-56a, 58a-59a, 138a.[11]

3. In sum, the Board, on remand from *ILA I*, undertook precisely the inquiry specified by this Court and concluded that the stripping and stuffing done in connection with shortstopping and the warehousing practices—unlike that done by freight consolidators—is not historically and functionally associated with longshore work and is not part of the traditional work patterns of longshoremen. In view of the purposes of shortstopping and the warehousing practices and their traditional integral association with the functions not of longshoremen but of motor

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tion, these warehouses stored small lots of cargo for eventual consolidation and shipment to the pier with additional cargo sent by the same shipper. After containerization, these same services were performed by the warehouse by stuffing the accumulated cargo into a container with other cargo from the same shipper, which container could then be trucked to the pier and loaded onto the ship without further handling at the pier. See pages 9, 17, *supra*.

[11] In addition, if longshoremen were to begin to perform traditional warehousing functions, existing facilities would have to be modified; piers are not generally equipped to meet the demands for storage space and sorting capacity that a warehouse must fulfill. This further demonstrates the reasonableness of the Board's conclusion that stuffing and stripping done in connection with warehousing functions is not traditional longshore work.

carriers and warehouses, the Board's determination was plainly reasonable: the ILA was seeking "not to preserve, but to aggrandize, its own position" (*Pipefitters*, 429 U.S. at 530 n.16) by "acquiring for its members work that had not previously been theirs" (*National Woodwork*, 386 U.S. at 648 (Harlan, J., concurring)).

Indeed, the court of appeals, although it overturned these aspects of the Board's conclusions, does not appear to have disagreed with the Board's analysis of traditional work patterns and of the historical and functional nature of longshore work. On the contrary, the court appeared to recognize that the stuffing and stripping done in connection with shortstopping and the warehousing practices have traditionally been undertaken by the employees of motor carriers and warehouses, not by ILA labor. See Pet. App. 27a. Moreover, the court of appeals did not suggest that the Board violated the terms of this Court's mandate in *ILA I*. Instead, the court of appeals held that the Board "erred as a matter of law" (*ibid.*; footnote omitted) for a single specific reason that was not adumbrated by this Court's analysis in *ILA I*: the Rules are lawful, the court of appeals held, because they did not "deprive the truckers and warehousemen of *their* off-pier work" (Pet. App. 27a; emphasis in original).

Although the court of appeals did not fully explain why a finding that other employees were deprived of their work is a necessary predicate of concluding that the Rules are unlawful, the court appears to have reasoned that the Rules on Containers have a valid "work preservation" objective unless they have the effect of "acquiring" work for the longshoremen from other employees; the court then concluded that the

longshoremen cannot be said to have unlawfully "acquired" work unless they acquired it from the other employees, thereby leaving the others with less work. There are at least three errors in the court of appeals' reasoning.

First, there is no basis for the court of appeals' gloss on the "work preservation" doctrine; that doctrine does not refer to the extent to which others are deprived of work. As this Court remarked in a different context in *ILA I*, "[t]he effect of work preservation agreements on the employment opportunities of employees not represented by the union * * * is * * * irrelevant to the validity of the agreement" (447 U.S. at 507 n.22). This Court has never suggested that a union is entitled to engage in secondary activity in order to acquire new work that did not traditionally belong to its employees so long as it does not deprive other employees of their work. On the contrary, as the name of the work preservation doctrine suggests, and as the Court emphasized in *ILA I* itself, the question is whether the work claimed by the bargaining unit employees is sufficiently related to the work they have traditionally performed. "[T]o determine whether an agreement seeks no more than to preserve the work of bargaining unit members, the Board must focus on the work of the bargaining unit employees, not on the work of other employees who may be doing the same or similar work" (*ILA I*, 447 U.S. at 507; footnote omitted). See *id.* at 510 & n.24 (The legality of the agreement "will depend on how closely the parties have tailored their agreement to the objective of preserving the essence of the traditional work patterns."); *National Woodwork*, 386 U.S. at 646 (upholding Board determination that "the conduct of the Union * * * related solely to preserva-

tion of the traditional tasks of" bargaining unit employees); pages 26-27, *supra*.

Second, the court of appeals overlooked the fact that this Court in *ILA I* specifically contemplated that the Board, in assessing the validity of the Rules, might take into account that "containerization has worked such fundamental changes in the industry that the work formerly done at the pier by * * * longshoremen * * * has been completely eliminated." 447 U.S. at 510-511. As we have noted, the Board explicitly found, with respect to shortstopping and traditional warehousing practices, that the longshoremen's traditional work has been eliminated. See Pet. App. 59a-60a. The court of appeals itself recognized that because an import FSL container can be attached to a truck chassis and taken on the road to the owner, certain work previously done by longshoremen in connection with shipments destined for a single consignee—unloading the break-bulk cargo from the ship and placing it at the head of the pier for collection by a truck—has been eliminated (*id.* at 27a). The fact that the motor carrier hauling an FSL container might, for its own purposes, rearrange its truck loads, stripping the container in the process—that is, shortstopping—does not alter the fact that the longshoremen's work has been eliminated.

The court of appeals' analysis cannot be squared with this Court's statements about the elimination of work in *ILA I* and the Board's finding that certain work of the longshoremen has been eliminated. The point of the Court's statement in *ILA I* about the elimination of work is that if work has been "completely eliminated" (447 U.S. at 511) by technology, a union may not "preserve" that work by attempting to gain other work that did not traditionally belong to it. The Board found that the ILA's role in load-

ing truckloads destined for a single consignee (or unloading truckloads from a single shipper) is eliminated when an FSL container is used, whether or not that container is shortstopped or stuffed or stripped in connection with certain traditional warehousing practices. The ILA's effort to compensate for the loss of this work by obtaining stripping and stuffing work that is traditionally done by motor carrier employees and warehousemen, not longshoremen, is not valid work preservation but is instead unlawful under Section 8(e). The consideration to which the court of appeals attached preeminent importance—whether the Rules cause non-ILA employees to be deprived of work—is simply immaterial, because an agreement that attempts to compensate a bargaining unit in this way for work that has been eliminated by technological innovation is unlawful whether or not it deprives other employees of work. In *ILA I*, this Court, in suggesting that the Board might find that the Rules do not serve a valid work preservation objective because the longshoremen's work had been eliminated, did not intimate that the Board must also find that the Rules deprive other employees of work.

Finally, the court of appeals simply assumed that, in fact, the Rules have no effect on the employees of motor carriers engaged in shortstopping or of warehouses engaged in traditional warehousing practices. In making this assumption, however, the court of appeals failed to give the proper deference to the Board's determination that the longshoremen's work had been eliminated and to the finding of the ALJ, upheld by the Board, that the work the longshoremen were seeking to acquire was traditionally that of other employees. Pet. App. 57a-59a. Specifically, the court of appeals' assumption ignores the economic realities underlying the Board's determination. The court as-

sumed that enforcement of the Rules would simply reestablish an initial, duplicative break-bulk handling by longshoremen and leave the inland work patterns of truckers and warehouses unaffected. But break-bulk handling is labor intensive and costly, and a second break-bulk handling creates an additional risk of lost or damaged goods. Any process requiring a second such handling therefore suffers a significant economic disadvantage; this is precisely why containerization grew in the first place. See *ILA I*, 447 U.S. at 494-495.

The more reasonable assumption, therefore, is not that the longshoremen will do duplicative work but that the industry will develop practices that avoid an unnecessary break-bulk handling. For example, longshoremen might perform the integrated task previously performed by truckers and warehouse employees, with facilities at the pier being modified to the extent necessary to permit this—in which event the longshoremen would have directly deprived the other employees of their work, contrary to the court of appeals' assumption.[12] Indeed, it is notable that—again contrary to the court of appeals' assumption that the Rules will simply bring about duplicative stripping and stuffing by the ILA—the Rules do not provide for longshoremen to restrip or restuff FSL containers that have been stripped or stuffed by other employees in violation of the Rules. Instead, the Rules are a prohibition—enforceable by the payment of liquidated

[12] Alternatively, if it is possible—which it will not always be (see J.A. 117-118, 129, 206, 212-213)—cargo might be diverted to truck terminals and warehouses beyond the 50-mile limit covered by the Rules (see J.A. 32-33, 59-60, 101, 115-116, 131-132, 136-137), a step that would also deprive certain motor carriers and warehouse employees of work.

damages—against the delivery of containers to companies that permit employees to strip or stuff them in violation of the Rules. Thus the Rules directly seek to deprive other employees of their work.

CONCLUSION

The judgment of the court of appeals, insofar as it denied enforcement of the Board's order, should be reversed.

Respectfully submitted.

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No. 84-861

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *et al.*,

Respondents.

OBJECTION TO BRIEF *AMICUS CURIAE* PROFFERED BY DELTA STEAMSHIP LINES, INC.

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Respondents.

OBJECTION TO BRIEF *AMICUS CURIAE* PROFFERED BY DELTA STEAMSHIP LINES, INC.

The motion of Delta Steamship Lines, Inc. for leave to file a brief *amicus curiae* is totally devoid of merit. Not only does Delta fail to comply with Sup. Ct. R. 36.3, it makes no pretense of even trying to satisfy that rule's requirements for *amicus* status. Delta asserts no interest in the case now before the Court. Its proposed brief deals with issues admittedly foreign to the disposition of this case. Nowhere in Delta's motion or in its proposed brief is there a single nexus which would warrant Delta's intrusion into this case.

Rule 36.3 requires an applicant for *amicus* status to state its interest in the case and the facts or questions of law relevant to the disposition of the case which will not be adequately presented by the parties. Sup. Ct. R. 34.1(a) confines an *amicus* brief to the issues presented in the petition for certiorari. Any *amicus* argument not presented or passed on by the tribunals below nor advanced by any party before this Court will not be entertained. *United*

Parcel Service, Inc. v. *Mitchell,* 451 U.S. 56, 60 n.2 (1981); *Bell* v. *Wolfish,* 441 U.S. 520, 531 n.13 (1979); *Knetsch* v. *United States,* 364 U.S. 361, 370 (1960).

By its own admission, Delta's interest is not in this lawsuit but in another now pending in the Southern District of New York. *See* Delta's Motion at 1-2; Delta's Brief at 1-2. By its own admission, the issues in that other litigation, which Delta addresses in its proposed brief, are unrelated to the questions before this Court and were "not envisioned" by the court of appeals below. *See* Delta's Brief at 2. Those issues concern contractual provisions never challenged in the unfair labor practice proceedings underlying this case. In fact, they concern a contract which did not come into existence until after this case was argued in the court of appeals. *See* Appendix to Delta's Brief.

Delta's attempt to interject those issues into this case is an unwarranted imposition upon the Court and the parties. Delta's entire proposed brief is devoted to questions that were before neither the court of appeals nor the National Labor Relations Board. Indeed, these issues have never even been mentioned in the 15 years of multi-circuit litigation involving the Rules on Containers, which culminated in the case now before this Court. Delta unabashedly seeks to insinuate this Court into the other unrelated litigation. Delta's suggestion that the lower courts would be misled by some "unintended signal" from this Court is not complimentary to the federal judiciary. *See* Delta's Brief at 8.

Delta's attempted intrusion into this case to obtain what is tantamount to an advisory opinion in another case not yet decided by any tribunal should not be countenanced. Delta's application should be denied, and its proposed *amicus* brief rejected and returned.

To discourage future flouting of the *amicus* rules of this Court, sanctions should be imposed against Delta in the

form of an award of costs and attorneys' fees to Respondents to recompense them for the needless effort and expense of answering a frivolous application that should never have been made.

Dated: New York, New York
March 13, 1985

Respectfully submitted,

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No. 84-861

In the Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS AMERICAN TRUCKING ASSOCIATIONS, INC. AND TIDEWATER MOTOR TRUCK ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the National Labor Relations Board correctly concluded that the collectively bargained rules governing the use of containers in the shipping industry, in their application to certain widespread practices of motor carriers and warehouses, lack a valid work preservation objective and therefore constitute unlawful secondary activity under Sections 8(b)(4)(B) and 8(e) of the National Labor Relations Act, 29 U.S.C. §§158(b)(4)(B) and 158(e).

PARTIES TO THE PROCEEDING

The proceeding in the court whose judgment is sought to be reviewed encompassed four consolidated cases seeking review or enforcement of decisions of the National Labor Relations Board. In addition to the National Labor Relations Board, the following parties appeared in one or more of the four consolidated cases: American Trucking Associations, Inc.;[1] Tidewater Motor Truck Association;[2] American Warehousemen's Association; International Association of NVOCCs; Houff Transfer, Inc.; International Brotherhood of Teamsters; International Longshoremen's Association, AFL-CIO; ILA Hampton Roads District Council; ILA Atlantic Coast District Council; ILA District Council, Baltimore, Maryland; ILA Locals 333, 846, 862, 921, 953, 970, 1248, 1355, 1416, 1416-A, 1429, 1458, 1526, 1526-A, 1624, 1680, 1736, 1783, 1784, 1819, 1840, 1922, and 1970, AFL-CIO; New York Shipping Association; Council of North Atlantic Shipping Associations; Hampton Roads Shipping Association; Southeast Florida Employers Port Association; Coordinated Caribbean Transport, Inc.; Chester, Blackburn & Roder, Inc.; Eagle, Inc.; Eller & Company, Inc.; Harrington & Company, Inc.; Strachen Shipping Company; Marine Terminals, Inc.; Florida Custom Brokers and Forwarders Association, Inc.; Twin Express, Inc.; National Container Express, Inc.; and San Juan Freight Forwarders, Inc.

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1. ATA, a non-profit District of Columbia corporation, is a national federation of 51 independent and autonomous "state trucking associations," each representing all classes and types of trucking operations. Full membership in ATA is obtained by companies and individuals through affiliation with the state associations. Virtually every major trucking company in the United States is an affiliate of ATA.

2. TMTA is an unincorporated association consisting of seventeen member companies, most of whom are affiliated with ATA.

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No. 84-861

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a)[3] is reported at 734 F.2d 966. The decision and order of the National Labor Relations Board (Pet. App. 35a-64a) and the decision of the Administrative Law Judge (Pet. App. 65a-258a) are reported at 266 NLRB 230.

3. "Pet. App." refers to the appendix filed jointly by the petitioners in Nos. 84-677, 84-684, 84-691, and 84-696. "Jt. App." refers to the appendix filed in No. 84-861. "C.A. App." refers to the appendix filed in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1984. Pet. App. 1a-30a. A petition for rehearing was denied on July 31, 1984. Pet. App. 31a-34a. The petition for a writ of certiorari was timely filed on November 28, 1984, and was granted on January 21, 1985. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(b) of the National Labor Relations Act ("Act"), 29 U.S.C. §158(b), provides in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> * * *
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce where in either case an object thereof is:
>
> * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . .

Section 8(e) of the Act, 29 U.S.C. §158(e), provides in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void . . .

STATEMENT OF THE CASE

A. The Rules on Containers

This case concerns the legality of the Rules on Containers ("Rules") negotiated by the International Longshoremen's Association ("ILA") and various ocean vessel operating common carriers ("VOCCs" or "steamship lines") and their associations. The Rules are a response to a technological change in the freight transportation industry customarily referred to as "containerization." A large, reusable metal container that can be moved on and off an ocean vessel unopened and transferred between different transportation modes is the primary hardware of the new technology.[4] Jt. App. 190.

4. Containers range in length from 20 to 40 feet and are capable of holding upwards of 30,000 pounds of freight. They

(Continued on following page)

Four distinct segments of the freight transportation industry handle containers. Each serves a different basic transportation function. VOCCs use containers in connection with ships to unitize cargo for loading, transport and unloading. VOCCs employ ILA represented labor to perform this work.[5] Consolidators, including NVOCCs, use containers to combine the goods of various shippers into a single shipment at their own off-pier terminals and deliver the container to the pier.[6] *ILA I,* 447 U.S. at 496 n.8.

Footnote continued—

can be placed on truck chassis or on railroad flatbed cars and transported unopened to and from the ocean pier, and they fit into the holds of specially designed vessels known as containerships. *NLRB v. International Longshoremen's Assn. ("ILA I")*, 447 U.S. 490, 494 (1980).

5. ATA argued unsuccessfully to the Administrative Law Judge ("ALJ") and the Board that the Rules had a secondary objective because they were negotiated between VOCCs and the ILA as representative of the bargaining unit of "longshoremen," who load and unload cargo to and from the ships, but are for the primary purpose of preserving work for "short-shoremen," employed by terminal and stevedoring companies and represented by the ILA in separate bargaining units, at least in the Port of Hampton Roads, Virginia. ATA Brief to the Bd. at 15-17, 50-54. It is the short-shoremen who segregate, mark, unitize, and otherwise handle the cargo in the terminal areas, load and unload the cargo to and from the containers, and move the containers to and from the locus of the ship's tackle where the containers are then handled by the longshoremen employed by stevedoring companies to load and unload ships. Only longshoremen are covered by the Rules on Containers agreement. Only by blurring the separate employment relationships of maritime employers and the work traditions of their work forces was the ALJ able to ignore the clear secondary objective of the Rules to protect the work in sister ILA locals not covered by the Rules. Pet. App. 106a n.29. Therefore, all maritime employees represented by the ILA will be referred to hereinafter as "longshoremen."

6. Consolidators may or may not own and operate their own motor trucks. Some contract with motor carriers for the actual transportation of the goods. A consolidator who acts as a carrier by arranging and being responsible by a single bill of lading for the transportation of goods from shipper to consignee or from an inland warehouse across the sea to an inland destination location is called a non-vessel operating common carrier by water ("NVOCC"). *ILA I,* 447 U.S. at 496 n.8.

Motor carriers use containers on truck chassis to transport containers filled with export cargo from shippers to the pier and to transport containers filled with import cargo from the pier to consignees. *ILA I,* 447 U.S. at 500-501. Warehouses unload import cargo from containers for storage and containerize for export previously stored cargo.[7] Consolidators, motor carriers and warehouses employ labor represented by the Teamster's Union and unrepresented labor to handle containers. Jt. App. 6, 15-16, 49, 63, 89-90, 127.

The loading of containers, by whomever performed, is known as "stuffing"; the unloading of containers is known as "stripping." *ILA I,* 447 U.S. at 497; Pet. App. 84a. A container that contains export cargo belonging to more than one shipper or import cargo destined for more than one consignee is termed a "consolidated load," or a "less-than-container load" ("LCL") container. A container that contains export cargo from only one shipper or import cargo destined for only one consignee is known as a "full shippers load" ("FSL") container. *ILA I,* 447 U.S. at 497.

The growth of containerization reduced the traditional loading and unloading work performed by both longshoremen and truckers at the seaport terminal. Containers eliminated the need for piece-by-piece (or "break-bulk") cargo handling between the ship and the truck. *ILA I,* 447 U.S. at 495-496; Pet. App. 46a. Export containers were stuffed before they reached the pier; import containers were stripped after they left the pier. With respect to containerized cargo, it remained only for longshoremen to take

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7. Containers are also used by the actual or "beneficial" owners of goods to send goods from or receive goods at their place of business. Beneficial owners may contract with VOCCs, consolidators, motor carriers and/or warehousemen for services in connection with the transportation of import or export containers.

the containers on and off the vessel, and for truckers to drive away with the containers. Pet. App. 46a-47a; Jt. App. 154; C.A. App. 602, 635-36, 640-42, 677.

Seeking to replace the work lost by ILA members because of containerization, the ILA and the Council of North Atlantic Shipping Associations ("CONASA"), an organization of shipping associations whose members are steamship lines and stevedoring companies operating out of North Atlantic ports, the New York Shipping Association (an association of VOCCs operating out of the Port of New York), and other Respondent maritime associations and employers have negotiated a series of collective bargaining agreements incorporating the Rules. These agreements have been adopted by the ILA and multi-employer associations in every major Atlantic and Gulf Port. Pet. App. 47a, 96a-97a & n.23; Jt. App. 200; C.A. App. 1157, 1189.

The Rules require that, with one relevant exception, all containers, whether LCL or FSL, which would otherwise be stuffed or stripped within 50 miles of a port by employees other than those of the beneficial owner of the cargo, must be stuffed or stripped by ILA-represented longshoremen at the seaport terminals. The exception is for FSL import containers where the cargo is to be warehoused at a bona fide warehouse for a minimum of 30 days. Pet. App. 103a, 232a-233a.

The Rules forbid the signatory employers from supplying containers to any person or business entity operating in violation of the Rules. The Rules also require any VOCC, which fails to comply with the Rules and releases for handling a container that should have been stuffed or stripped on the pier by longshoremen, to pay liquidated damages of $1,000 per container into the container royalty fund. Pet. App. 11a, 47a, 103a, 228a-229a. The ILA has repeatedly attempted to enforce the Rules through penalties, threats and inducements. Pet. App. 179a-182a. To protect themselves from ILA fines the steamship lines have refused to permit the release of empty or full containers to motor carriers, consolidators, and warehouses when it is believed that they would be stuffed or stripped in violation of the Rules.

B. ILA I

In *ILA I*, this Court remanded a Board holding that the Rules unlawfully sought work always performed off-pier, because the Board had improperly relied upon the lack of ILA off-pier work traditions. *ILA I*, 447 U.S. at 506-08. The Court directed the Board to "evaluate the relationship between traditional longshore work and the work which the Rules attempt to assign to ILA members." *Id.* at 509. The Court explained that the legality of the Rules turned, as an initial matter, "on whether the historical and functional relationship between this retained work and traditional longshore work can support the conclusion that the objective of the agreement was work preservation rather than the satisfaction of union goals elsewhere." *Id.* at 510. The Court noted that "the result will depend on how closely the parties have tailored their agreement to the objective of preserving the essence of the traditional work patterns." *Id.* at 510 n.24.

The Court recognized that in the instant case, technological innovation had "changed the method of doing the work, instead of merely shifting the same work to a different location." *Id.* at 505. Where the method of doing the work has changed, the Court cautioned that a union is entitled to preserve only its "*traditional work patterns.*" *Id.* at 506 (emphasis added).

The Court declined to apply this "historical and functional relationship" test in the first instance to the facts before it, on the ground that the Board had not "had an opportunity to consider these questions in relation to a proper understanding of the work at issue." *Id.* at 511. Rather, the Court directed the Board to determine whether the "stuffing and stripping reserved for the ILA by the Rules is functionally equivalent to their former work of handling break-bulk cargo at the pier," or whether, "containerization has worked such fundamental changes in the industry that the work formerly done at the pier by both longshoremen and employees of motor carriers has been completely eliminated." *Id.* at 510-11.

This Court disclaimed in *ILA I* any intention to either "decide today the proper definition of the work in controversy . . . [or] hold that the Rules are a lawful work preservation agreement." *Id.* at 511 n.26. Rather, the Court emphasized that "the question whether the Rules may be sustained under a proper understanding of the work preservation doctrine must be answered first by the Board on remand." *Id.*

C. Findings of the Administrative Law Judge

On remand, the Board consolidated the two cases reviewed in *ILA I* with seven other proceedings concerning the Rules. Prior evidentiary records were significantly supplemented.

Upon consideration of the evidence in light of the mandate of this Court, the ALJ rejected ATA's contention that containerization has worked such fundamental changes in the freight transportation process that container work dictated by customers to be performed away from the piers was not functionally related to traditional

ILA work. Pet. App. 114a-123a.[8] The ALJ found the Rules had a general work preservation objective, and that all of the container work performed by NVOCCs and other pure consolidators, as well as some of the container work of motor carriers and warehousemen, could be preserved by the Rules for the benefit of the longshoremen.

Although the ALJ did not find that containerization had so fundamentally changed the transportation industry that all of the new work was functionally unrelated to traditional ILA work, he did find that certain motor carrier and specialty warehouse container work was functionally unrelated to traditional ILA work, and therefore, was beyond the lawful reach of the Rules. The ALJ turned his decision on the presence or absence of a functional relationship between traditional ILA work and the various categories of work sought by the Rules.

1. Findings as to consolidators

The ALJ found that the Rules were lawful as applied to consolidators, including NVOCCs, because they are almost exclusively engaged in the handling of LCL cargo on behalf of small shippers. Pet. App. 125a. The ALJ found that this work served the same function in the course of ocean transportation of cargo as the work historically performed by ILA members. Pet. App. 123a-129a. The ALJ stated that "the NVOCCs and steamship companies are competitors, and the NVOCCs' stuffing and stripping of containers owned or leased by the former is pursuant to a reallocation of work from the piers to offshore facilities created virtually in its entirety by the development of containerization." Pet. App. 129a. The propriety of this find-

8. This issue has been presented for review by ATA's Petition for Certiorari, Case No. 84-696, still pending before the Court.

ing apparently is not within the scope of the Court's grant of certiorari herein.[9]

2. Findings as to motor carriers

The ALJ found that the Rules could *not* lawfully be applied to certain practices of motor carriers, because these practices were neither historically nor functionally related to the traditional work of ILA members.

As regards the motor carriers' handling of import cargo, the ALJ found that prior to containerization motor carriers picked up break-bulk cargo at a seaport terminal and delivered the cargo to the motor carrier's freight station where it was unloaded and then reloaded into over-the-road equipment for delivery to one or more consignees. The ALJ further found that this practice of off-loading, sorting, segregating and reloading by destination was "a practice which possessed no exclusive relationship to marine trade," noting that "cargo shipped purely on an interstate or continental basis by motor truck . . . is subject to the same handling at terminals and truck stations." Pet. App. 132a-133a.

After containerization, motor carriers began to pick up containers from the pier and reload the containers at the motor carriers' freight stations into over-the-road equipment, a practice known as "short-stopping."[10] The ALJ

9. ATA concedes, but only for the purposes of considering the issue herein, that the ALJ appropriately awarded some of the work sought by the Rules to longshoremen. ATA's Petition for Certiorari is still pending as to this work. Case No. 84-696.

10. The ALJ used the term "short-stopping" to denote only the stripping and restuffing of *import* containers. Pet. App. 133a-135a. In *ILA I,* the Court used the term "short-stopping" to denote the stripping and restuffing of either import or export containers. *ILA I,* 447 U.S. at 501. This brief uses the term in its latter, broader definition.

found that the short-stopping of import containers by motor carriers was simply a continuation of traditional motor carrier work which bore no historical or functional relationship to the traditional work of ILA members:

> [I]t appears that the practice of short-stopping is rooted in traditional motor carrier transport cargo handling procedure, which is performed by motor carriers for their own benefit and convenience. To the extent that containers are handled *for such purposes,* and not under direction or for the benefit of shippers, consignees or their agents, *short-stopping has no relevance to the marine leg of the intermodal network.* Although skills utilized therein are indistinct from those of deepsea longshoremen in the performance of their traditional duties, *it is work assumed for a different purpose, and in a different segment of the transportation industry.* Short-stopping is simply a carrier oriented, as distinguished from consumer oriented service, and as such neither competes with marine cargo handling nor amounts to a subterfuge to oust longshoremen of their traditional work. To this extent, upon delivery of a container to a motor carrier, the seaborne leg ends, the *container becomes the substitute for the trailer or van,* and work beyond this interface was neither created by containerization nor does it make inroads on that traditionally made available to deepsea ILA labor by marine operators.

Pet. App. 134a-135a (footnote omitted) (emphasis added).[11]

11. The ALJ held that motor carriers could short-stop both FSL and LCL containers for their own benefit and convenience, but the Rules could be enforced to prevent motor carriers from consolidating and deconsolidating LCL containers for the benefit of customers, because that would "encourage a diversion of work to combined trucking/warehouse operations, or for that matter to truck stations, to evade the legitimate reach of the Rules and to undermine traditional ILA work jurisdiction." Pet. App. 139a n.55, 137a n.54, 133a, 132a.

As regards motor carriers' handling of FSL and non-consolidated LCL export containers,[12] the ALJ found:

> [M]otor carriers also have stuffed FSL containers for export within the port area. For example, since containerization, certain interstate truckers have stuffed FSL containers at their port area truck stations. Thus, in order to avoid inconvenience attendant in the delivery of empty containers to shippers so as to enable stuffing by the customers' employees and immediate transport to the pier, such cargo will be hauled in trailer loads to the truck station, where it will be stuffed into FSL loads and delivered to the pier. Evidence also exists that at least one carrier stuffed all export FSL containers at its port area truck station because its tractors were incompatible with and were damaged by containers.... [T]*he stuffing of outbound FSL containers by entities acting purely in the capacity of motor carriers, not as a direct service to customers, but to facilitate their own transport needs, would seem incidental to the movement of surface freight.* As such, the FSL container handling would fall within the framework of traditional motor carrier practice, relative to the preparation of freight for delivery from port trucking station to the piers, as well as the conversion of cargo from over-the-road to local type equipment. If this work is not offered to the public as an available service, or performed under an ocean bill of lading, or on behalf of an NVOCC, ocean freight forwarder or anyone else engaged in services offered by employers of ILA labor, *it bears an insufficient relationship to work performed within the marine leg of the transport system, to represent work fairly claimable by deepsea ILA labor.* As is [t]rue of "short-

12. See n.10 *supra*.

> stopping", application of the Rules in this context is viewed as an attempt to offset job losses on the piers by disrupting inland work patterns not involving work lost by longshoremen in consequence of containerization.

Pet. App. 136a-137a (footnotes omitted) (emphasis added).

3. Findings as to warehousemen

The ALJ held that the Rules could lawfully be enforced to prevent warehousemen from (a) consolidating and deconsolidating LCL containers, (b) stripping and stuffing of LCL containers not consolidated or deconsolidated by warehousemen, and (c) stripping and stuffing FSL containers when such stripping and stuffing is performed for the sole purpose of avoiding this work at the piers. Pet. App. 137a n.54, 139a n.55, 141a, 144a, 145a n.59. The ALJ reasoned that:

> Since the distinction between container handling which is and which is not rightfully claimable by ILA, insofar as warehousing is concerned, to a great extent is a function of time, the 30-day storage rule is not wholly inapposite to ILA's legitimate claim *insofar as it extends to cargo lots no part of which is received by a warehouse for indefinite holding.* In this posture, the 30-day storage rule seems a logical basis for *distinguishing the historic warehouse function from that which is merely an inland container station established to erode ILA historical work jurisdiction.*

Pet. App. 142a (emphasis added).

However, the ALJ found that the Rules' 30-day storage requirement cut too deeply into traditional warehouse

practices. Pet. App. 141a. As regards the handling by warehouses of *import* cargo, the ALJ found that prior to containerization import cargo would be delivered to the warehouse by a trucker, where the trailer or truck would then be unloaded, with the cargo sorted, segregated, palletized and placed in a designated storage area, until the consignee instructed the warehouse to distribute or deliver the goods. Pet. App. 138a. The ALJ further found that after containerization warehousing practices did not change; where previously warehouse employees stripped truck trailers, they now perform the same work upon containers. Pet. App. 138a.

Thus, the ALJ found that the Rules could not lawfully be applied to the stuffing and stripping of *FSL import* containers by warehouse employees where such work was done in connection with the traditional storage function of warehouses:

> The container handling services afforded by warehousemen as outlined above are and have been integrated into a surface system of transportation, which was not created by containerization, *and poses no threat to historic work jurisdiction of ILA.* As was true of motor carriers, the Rules on Containers as applied to such historic aspects of off pier work constitutes a work acquisition arrangement contemplating seizure of jobs on behalf of ILA to obtain traditional work of others to *compensate for their own unrelated job losses.* . . . [C]onsignees of imported goods often utilize inland warehouses to inventory imported goods, as against flexible and unforeseeable market demand. Such practices permit immediate delivery and avoid the delays encountered through a shipment from point of origin on sale, or customer order, method of doing business. *It is an integral part of the surface distribution system not generally, duplicated at portside marine operations, and container handling in conjunction therewith, is akin to the historic unloading of trailers at said site.* Application of the ILA's 30-day storage limitation so as to preclude a consignee's access to warehoused goods *in container-size lots* is often incompatible with the consignee's need to meet consumer demand, and enforcement of that restriction in such a context serves as an impediment to *inland work practices which bear no relationship to services customarily or historically available at pier side.*

Pet. App. 139a, 141a (emphasis added).

The ALJ held that, to the extent that warehouses stuffed or stripped *FSL export* containers without performing any specialized warehouse services, the work of the warehouses was historically and functionally related to traditional ILA work:

> Where no special services peculiar to the surface warehousing industry are provided or performed in connection with such activity, the work of stuffing the container could as easily be performed at pier side with ILA deepsea labor. The ban of the Rules on such a practice effectively restores for deepsea longshoremen the work they performed with respect to the cargo prior to containerization when shippers of large quantities of goods delivered full trailer loads directly to the piers.

Pet. App. 144a.

However, the ALJ reached a different conclusion where the handling by warehouses of *FSL export* cargo included the performance of specialized warehouse ser-

vices. Where this occurred he treated this work the same as FSL import container work. The ALJ found with respect to one example of warehouse work:

> The service provided by [a warehouseman] . . . , though involved with exports, is an incident of traditional shore-side services, conventionally available through inland warehouses, which *is not an essential preliminary maritime service*. The ILA's claim for this work by virtue of the Rules on Containers is no more in support of fairly claimable work than in the case of importation of FSL cargo for holding and distribution by a full service public warehouse located within the port area.

Pet. App. 144a n.58 (emphasis added). Similarly, the ALJ held that the stuffing of FSL containers for export by another warehouseman "was but an incident of general storage, picking, and consolidation, pursuant to an ongoing relationship between warehouse and single shipper, which together represent an integrated inland service, distinct from the temporary storage provided at marine terminal warehouses." Pet. App. 182a.

The ALJ recognized that the application of the Rules to warehouse work could not "be branded with overarching legality or illegality on a facial basis," and concluded that "the legitimacy of the Rules as they apply to warehousemen handling FSL containers must be resolved on a case-by-case basis."[13] Pet. App. 145a.

13. The various traditional warehouse practices found by the ALJ to be beyond the lawful reach of the Rules are hereinafter referred to as "specialty warehouse work."

D. The Board's Decision and Order

The Board affirmed the rulings, findings, and conclusions of the ALJ and adopted his recommended Order. Pet. App. 42a. However, the Board modified the ALJ's rationale for concluding that the Rules were unlawful as applied to short-stopping and traditional warehousing functions in this respect:

> The Administrative Law Judge also found that no new work was created by containerization for trucking and warehousing employees. Further, in contrast to consolidation, no work was diverted away from the pier to the truckers and warehouses as a result of containerization, at least as to those short-stopping and traditional warehousing services involved where he found violations. Rather, after containerization, some of the traditional loading and unloading work of the longshoremen, which had historically been duplicated by trucking and warehousing employees, essentially was eliminated. While we agree with the Administrative Law Judge's conclusion that the ILA had an unlawful work acquisition objective in claiming this loading and unloading work which is now done solely by trucking and warehousing employees in connection with short-stopping and traditional warehousing services, we do not agree with his reliance on the fact that the work now done by the truckers and warehouses is work which was not created by containerization. Instead, we point to the fact that, because of the efficiency of the new technology, the duplicative work of the longshoremen, in handling cargo which is then rehandled by truckers and warehouses, no longer exists as a step in the cargo-handling process.

Pet. App. 59a.

E. The Decision of the Court of Appeals

The court of appeals held that "the Rules are valid in all respects." Pet. App. 4a. It accordingly sustained the Board's Order insofar as it upheld the lawfulness of the Rules, but denied enforcement of the Order insofar as it held unlawful the Rules' application to short-stopping and traditional warehousing practices.

The court of appeals proceeded under the misapprehension that the ALJ had found the work in dispute to be historically and functionally related to traditional ILA work, and held that the Board would have committed error in finding that any of the work sought by the Rules was not historically and functionally related to traditional ILA work. Pet. App. 25a. Yet nowhere in his decision did the ALJ find that the new work of loading and unloading containers was functionally related to traditional ILA work patterns.[14]

Ignoring the detailed analysis of traditional work patterns developed by the ALJ, the court justified its holding with the simplistic observation that:

> Traditionally, longshoremen loaded cargo piece by piece into the hold of the ship and unloaded it piece by piece from the hold. The Rules grant them the right in certain instances to load cargo piece by piece into containers and unload it piece by piece from containers. In short, containerization has simply changed the locus of the work, moving the operation shoreward.

Pet. App. 25a.

Thus, the court held that the Board erred as a matter of law when it concluded that, because the Rules as applied to short-stopping and traditional warehousing practices "sought to preserve for the longshoremen work that had been rendered superfluous by the change in technology and not work that had been diverted to others," the Rules violated the Act in those applications. Pet. App. 27a. The court acknowledged that containerization had not altered the motor carriers' work and had made the longshoremen's work unnecessary:

> Prior to containerization, both the longshoremen and the truckers handled the break-bulk cargo as it moved from the ship to the consignee. . . With containerization, the off-pier work of the short-stopping truckers remains essentially unchanged except that they unload cargo from containers instead of from motor trucks. And with containerization, of course, the work formerly performed by the longshoremen has been rendered unnecessary because the container can be fastened to the chassis of a truck and transported intact to the trucking terminal or freight station.

Pet. App. 27a.

Nonetheless, the court ruled that the Board's conclusion that the application of the Rules to short-stopping does not have a valid work preservation objective was erroneous for the following reason:

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14. The closest the ALJ came to such a holding was his statement that "the work in controversy herein, was performed historically at the piers by deepsea ILA longshoremen, *and elsewhere by either truckers, warehousemen, or consolidators, at inland points;*" but, he also found "[t]here is no *inseparable* integration of these tasks with other labor functions [either on or off the pier] or technology." Pet. App. 119a (emphasis added). The Board has sought to bolster the ALJ's validation of the Rules in general by purporting to "agree with the Administrative Law Judge's finding that the work of loading and unloading containers claimed by the Rules is functionally related to the traditional loading and unloading work of the longshoremen." Pet. App. 58a-59a. However, the Board did not cite any language by the ALJ finding such a "functional relationship."

> [T]he Board conspicuously failed to ground this conclusion . . . in the only finding of fact that might support it: that the Rules, in preserving for ILA members the right to do this initial loading and unloading, somehow deprive the truckers and warehousemen of *their* off-pier work by transferring all or some of it to longshoremen at the pier. Put another way, the Board hung the "work acquisition" tag on the Rules in these two instances without a finding that the longshoremen acquired anything. . . [O]ne cannot possibly maintain that the stripping of import containers at the pier would in any way prevent the identical off-pier work. To repeat, truckers and warehousemen do precisely what they did before the change in technology; the longshoremen have acquired none of that work. Although the longshoremen's work in this process may well duplicate the off-pier work of truckers and warehousemen, calling this set of circumstances "work acquisition" strikes us as particularly inappropriate.

Pet. App. 27a-28a. The court asserted that "the Board made the identical error of law with regard to both short-stopping and warehousing." Pet. App. 27a n.8.

SUMMARY OF ARGUMENT

The Board correctly concluded that the Rules, as applied to short-stopping by motor carriers and to specialty warehouse work, lack a valid work preservation objective and therefore constitute unlawful secondary activity under Sections 8(b)(4)(B) and 8(e) of the Act, 29 U.S.C. §158(b)(4)(B) and 158(e).

In *ILA I*, this Court directed the Board to determine whether a historical and functional relationship exists between traditional longshore work and the work which the Rules attempt to assign to ILA members. *ILA I*, 447 U.S. at 509-10. The Court held that the Rules could be found lawful only to the extent that they preserve the essence of traditional ILA work patterns. *Id.* at 510 n.24. In directing the Board's attention to the function of traditional ILA work and the functions of the work claimed by the Rules, this Court intended the Board to analyze the purpose for which the various types of work are performed and the role of that work within the freight transportation system as a whole.

The Board properly applied the analysis mandated by this Court in finding that the short-stopping and specialty warehouse work sought by the Rules is not historically or functionally related to traditional ILA work. Substantial evidence supports the Board's findings. Undisputed evidence establishes that both before and after containerization the function of longshoremen has been to load and unload cargo of whatever size to and from ships and handle it between the ships and the trucks. In contrast, the function of short-stopping by motor carriers is to permit safer and more economical transport of cargo between the piers and inland points. Longshoremen have

never handled cargo or stripped and stuffed containers in furtherance of this motor carrier function. Similarly, the function of specialty warehouse work is to perform special packing and distribution services in connection with the storage of goods for later release pursuant to the instructions of the shipper or consignee. The facilitation of intermediate storage and surface distribution of goods has never been within the function or purpose of longshore work.

The court of appeals erroneously believed that the Board found all the work claimed by the Rules to be historically and functionally related to traditional ILA work. In fact, the Board unambiguously adopted the findings and conclusions of the ALJ, who clearly found that short-stopping and specialty warehouse work was not historically and functionally related to traditional ILA work. Although the Board purported to modify some of the ALJ's rationale, its holding that the Rules are unlawful as applied to short-stopping and specialty warehouse work is ultimately grounded upon the ALJ's findings that pre-containerization longshore work functions had never included the functions served by short-stopping and specialty warehouse work.

The court of appeals ignored the ALJ's careful analysis of the functions served by the various types of work claimed by the Rules and held that the Board was compelled to find a historical and functional relationship between traditional ILA work and all the work claimed by the Rules simply because both types of work involve the loading and unloading of cargo piece by piece. In equating a physical resemblance in job skills or duties with a historical and functional relationship between traditional longshore work and the work claimed by the Rules, the court of appeals misapplied this Court's standard. In *ILA I,* this Court recognized that both traditional ILA work and modern container work involved the loading and unloading of cargo piece by piece, but this Court rejected the argument now adopted by the court of appeals that the container is simply the hold of the ship moved shoreward.

The court of appeals further erred in holding that the Rules must be held lawful absent a finding that the Rules deprive motor carriers and warehousemen of work. In *ILA I,* this Court held that the two relevant tests of legality were first, whether the work in dispute was historically and functionally related to traditional ILA work, and second, whether the VOCCs possess the right to control the disputed work. By requiring a finding that motor carriers and warehousemen have lost work, the court of appeals has held that the Rules may claim work even though it is not historically and functionally related to traditional ILA work.

The court of appeals' reliance on its assumption that motor carriers and warehousemen have not lost work as a result of the Rules is factually as well as legally unsound. Substantial evidence establishes that motor carriers and warehousemen within 50 miles of the piers have lost and will continue to lose work due to the enforcement of the Rules, whether or not any of the disputed work returns to the piers.

Since the Board properly applied the test mandated by this Court in *ILA I,* the Board's Order as to short-stopping and specialty warehouse work should be enforced.

ARGUMENT

A. The Proper Perspective For The Work Preservation Analysis.

The Court recognized in *ILA I* that "technological innovation may *change the method* of doing the work, instead of merely shifting the same work to a different location." *ILA I*, 447 U.S. at 505 (emphasis added). The Court instructed:

> Identification of the work at issue in a complex case of technological displacement requires a careful analysis of the *traditional work patterns* that the parties are allegedly seeking to preserve, *and of how the agreement seeks to accomplish that result* under the changed circumstances created by the technological advance. The analysis must take into account "all the surrounding circumstances," . . . *including the nature of the work both before and after the innovation.*

Id. at 507 (emphasis added). The "work at issue" in this case was defined by the Board, with the court of appeals' approval, as:

> [T]he initial loading and unloading of cargo within 50 miles of a port into and out of containers owned or leased by shipping lines having a collective-bargaining relationship with the ILA.

Pet. App. 57a; 22a.

The Board was then required to measure the work in dispute against the "traditional work patterns" of the ILA, "taking into account the transformation of several interrelated industries or types of work." *ILA I*, 447 U.S. at

507. The Court's instructions did not license an award of work associated with containers which was outside of the traditional work patterns of longshoremen no matter how many jobs were eliminated by the new technology.

The uniqueness and difficulty of this case lies in the fact that the new technology has unquestionably eliminated break bulk cargo handling work by longshoremen and truckers on the piers. *ILA I*, 447 U.S. at 495. With respect to this work preservation model, the disputed break bulk handling work flows through the bargaining unit in the container pipeline and never returns in any form.[15] Just how much of the cargo handling work attendant to the new container technology should be siphoned away from the container pipeline and considered "related" to or a "part" of the traditional work function of longshoremen depends in large part on the definition of their function before containerization.

ATA believes the proper division of work functions between the transportation modes is at the historic interface where ocean borne cargo was transferred between longshoremen and truckers, because the traditional function of longshoremen has been to unload cargo of whatever size and handle it between the ships and the trucks. This Court, the ALJ, and all Respondents agreed that this was precisely the traditional function of longshoremen. *ILA I*, 447 U.S. at 510; Pet. App. 105a; Shipping Group's

15. *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612 (1967), involved a model of work preservation where the disputed work was sent out of the unit for processing with the new technology and then brought back into the unit for further work. The court of appeals failed to recognize the difference in the *National Woodwork* model and the *ILA I* model, which led it to an improper reliance on the concept of "work acquisition" discussed in *National Woodwork*, 386 U.S. at 630-31.

Brief to the Fourth Circuit ("SGB 4 C.A.") at 6. Although the ALJ and the Board believed that the ILA was entitled to claim all of the work preformed by consolidators, and much of the work performed by warehousemen and motor carriers, they found the short-stopping and specialty warehouse work to be unrelated to the traditional functions of the ILA.

The ALJ revealed the lack of any relationship between the longshoremen's traditional function and the function of the short-stopping and specialty warehouse work by considering the *purposes* for which various types of container work are performed.[16] Pet. App. 112a, 134a, 136a, 119a, 123a. Where the purpose is to avoid cargo handling by longshoremen, which but for development of the container technology might have been performed at the piers, the new container work is considered to be sufficiently related to traditional longshore work to find the Rules lawful. But, where the purpose is to serve the convenience of motor carriers and warehousemen, rather than shippers for whom VOCCs competed for business, the objective of the Rules was considered to be other than work preservation, because the function of traditional ILA work has never been to serve the convenience of truckers or traditional warehousemen.

16. *The Random House College Dictionary* (Rev. Ed. 1980) (def. 1) defines "function" as "the purpose for which something is designed or exists; role." *The Merriam-Webster Dictionary* (1974) (def. 4) defines "function" as "an action contributing to a larger action; especially, the normal contribution of a bodily part to the economy of the organism." Similarly, *Webster's Ninth New Collegiate Dictionary* (1983) (def. 2) defines "functional" as "used to contribute to the development or maintenance of a larger whole." The Supreme Court clearly used "functional" in this sense of the word when it mandated an evaluation of the historical and functional relationship between traditional ILA work and the work sought by the Rules, "taking into account the transformation of several interrelated industries or types of work." *ILA I*, 447 U.S. at 507.

This Court recognized the possibility that different functions could be served by the use of containers when it rejected "the claim that if the Rules are upheld the union would be able to follow containers around the country and assert the right to stuff and strip them far inland" by noting that "[t]hat work would bear an entirely different *relation* to traditional longshore work, and would require a wholly different analysis."[17] *Id.* at 510 n.24 (emphasis added). Thus, whether "the essence of the traditional work patterns" bears a functional relationship to the work created by the new technology depends upon the purpose of the type of container work in question. The function or purpose of the container does not remain static; its function changes as its use changes. As the ALJ said, "upon delivery of a container to a motor carrier, the seaborne leg ends, [and] the container becomes a substitute for the trailer or van."[18] Pet. App. 135a.

The court of appeals erroneously believed that the Board "divorced itself completely" from the ALJ's conclusion that short-stopping and traditional warehouse work

17. The 50-mile perimeter established by the Rules is predicated on the assumption that all pre- and post-container work performed within the zone was equivalent to ILA traditional work functions. There are no findings of fact to this effect, and there is no substantial evidence in the record that supports such a self-serving presumption.

18. "The usefulness of a container lies precisely in the fact that it may function as an integral part of the hold while it is aboard a vessel, as a trailer when it is transported by truck, and as part of a railroad car when it is carried by rail." *ILA I*, 447 U.S. 510 n.23. "Merit exists in the observation by counsel for ATA-TMTA that containerization produced an equipment change which is 'chameleon-like' as it passes through various segments of the transport industry. . . . Thus, when one considers traditional business practices in the surface transportation industry, it seems only logical that the container, as it passes from marine stage of the journey into the hands of traditional surface conveyance, be treated as the equivalent of the trailer or truckload." Pet. App. 135a n.51.

bore no functional relationship to traditional ILA work. Pet. App. 22a. However, the court of appeals overstated the Board's disagreement with the ALJ's rationale. The only reservation the Board had with the ALJ's rationale was with his emphasis on the fact that short-stopping and traditional warehouse work was not diverted to motor carriers and warehousemen by the container technology. Pet. App. 59a. The Board agreed with the ALJ's conclusion that the purpose of this work was to benefit the off-pier employers rather than their customers. Pet. App. 42a. The Board cited *Carrier Air Conditioning Co. v. NLRB*, 547 F.2d 1178 (2d Cir. 1976), *cert. denied*, 431 U.S. 974 (1977), and *Associated General Contractors of California, Inc. v. NLRB*, 514 F.2d 433 (9th Cir. 1975), "where the creation of a new product entirely eliminated the work which the bargaining unit employees were seeking to preserve in the agreements found to be unlawful," merely as other examples wherein traditional work had been completely eliminated and integrated into a different work function. Pet. App. 59a-60a.

The difference in emphasis between the rationales of the Board and the ALJ is insignificant. Of far greater importance is the fact that the Board did not take issue with or qualify the ALJ's finding that "historically, the unloading and reloading work done by the truckers at local terminals was not done on behalf of shippers, but rather was done for reasons related to surface transportation, such as to combine several smaller truckloads into one larger truckload for delivery to the same geographic destination." Pet. App. 54a. Nor did it disturb the ALJ's finding that

> [S]ome of the short-term and long-term warehousing work claimed under this rule had *never been performed by ILA-represented employees* at the pier, but rather had traditionally been performed only by employees at inland public warehouses, such as the ongoing storage of a manufacturer's goods for distribution on short notice to customers based on future orders and the ongoing storage of a company's purchased inventory for distribution on short notice to its foreign facilities as demand required.

Pet. App. 56a (emphasis added). Thus, the Board's holding is ultimately grounded upon the ALJ's findings that precontainerization longshore work functions had never included the functions served by specialty warehouse work and by short-stopping for motor carrier convenience.

B. The ALJ's Findings As To Short-Stopping And Specialty Warehouse Work Are Supported By Substantial Evidence.

The Board's findings should be sustained on appeal if they are supported by substantial evidence on the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); National Labor Relations Act, Sections 10(e) and 10(f), 29 U.S.C. §160(e), (f).

The brief filed by Respondents with the court of appeals admitted that "the relevant facts are essentially undisputed . . . ALJ thus had no difficulty reaching his findings of fact which were adopted without reservation of the Board." SGB 4 C.A. at 4-5. The maritime group Respondents did not contend in the court of appeals that the ALJ's decision as to short-stopping and specialty warehouse work was not supported by substantial evidence. Instead, they argued that "Judge Harmatz, misapplying the legal principles enunciated in *ILA*, found that the Rules, although lawful on their face, constituted a secondary

work acquisition device when applied to certain trucking and warehousing practices." SGB 4 C.A. at 20. Therefore, assuming that the Board applied the proper legal analysis, the ALJ's conclusions that the Rules may not be enforced as to short-stopping and specialty warehouse work must be upheld because they are supported by substantial evidence on the record as discussed below.

1. Short-stopping by motor carriers

Motor carriers short-stop containers for their own benefit and convenience in the performance of their function as motor carriers. The function of local motor carriers is to pick up and deliver freight in the seaport areas either on behalf of beneficial owners located there or to transport it between the piers and motor carrier freight stations where it can be sorted and loaded onto over-the-road truck trailers for delivery to one or more inland points. Pet App. 132a; Jt. App. 6-7, 25-26, 90-93, 113-115, 127-128, 205-206, 228-230. Before containerization, this cargo usually had to be exchanged between a local cargo truck and an over-the-road truck because of different equipment and different classes of drivers who operate these trucks. Jt. App. 8-9, 14-15, 21, 25-26, 89-90, 112, 128, 130-131.

Motor carriers decide to short-stop containers for the same reasons that previously prompted them to transfer truckloads of break bulk cargo into over-the-road truck trailers. Like trailer loads of break bulk cargo picked up from the pier in the pre-container era, full containers may exceed state highway limitations or be overloaded, unbalanced or otherwise unsuitable for hauling long distances. Jt. App. 9-10, 115-116, 117-118, 129-130, 201, 206-207, 208-210, 212-213, 218, 222, 229-230. Motor carriers may also short-stop containers for economic considerations

related solely to their own operations. It is more economical for motor carriers to load the contents of two or more containers into one 45-foot truck trailer than to haul two containers long distances. Motor carriers avoid maintenance costs and per diem charges on containers by transferring the cargo onto their own trailers. They also avoid the cost of returning the empty containers from a long-haul delivery, because a road trailer can be sent on to some other inland point. Jt. App. 6-7, 9-10, 27-28, 69-70, 92, 98-99, 117-118, 129-131, 207-209, 212, 216-217, 222, 225-226, 229-230. To achieve these goals container stripping and stuffing is performed at the motor carrier's discretion and at his own expense. Jt. App. 91, 113, 117-118, 131. Neither VOCCs nor longshoremen have ever handled cargo or stripped and stuffed containers in furtherance of these motor carrier operating functions.[19]

2. Specialty warehouse work

Many warehouses offer local trucking services. Jt. App. 12-23, 43-62, 94-102. Unlike "pure" motor carriers, however, warehouses have storage capacity. Customers have always had discretion to time the release of cargo from storage whether within or beyond the first 30 days of storage.[20] Like motor carriers, warehousemen

19. Intermodalism permits shippers and consignees to dictate where and under what conditions containers will be stripped and stuffed. Pure intermodalism cannot always be accomplished. When containers are stripped and reloaded into truck trailers due to motor carrier considerations, the intermodal function of the container has worked to the limit of the advancement of the technology.

20. If a warehousing account is opened, there is a minimum 30 days storage charge regardless of how long the cargo is warehoused. Pet. App. 141a. Until the 1974 edition of the Rules the ILA exempted from the Rules the stripping and stuffing of containers with cargo "discharged at a bona fide public ware-

(Continued on following page)

have always performed unloading, sorting and consolidation work, sometimes at customer discretion, sometimes for their own convenience. Jt. App. 97-98, 101.

Although warehousemen do compete with seaport terminal companies regarding the function of preparing cargo for further sea, road and rail transportation and short-term storage, there are certain specialty warehouse functions which never have been performed by seaport terminal companies. The affidavits of Matthew Mahon, Jr., President of Mahon's Express, a trucker/warehouseman, cogently describe the functions of his company from its formation in 1905 through the attempted enforcement of the Rules in January 1981. Jt. App. 43-62. The ALJ recognized that Mahon's services on behalf of F.W. Woolworth Company, S.S. Kresge Company and other retail chains served transportation and distribution functions never historically within the function of ILA represented employees or their employers. Pet. App. 144a n.58. The ALJ reached the same conclusion with respect to the operations of Wilson Container Co., Inc. Pet. App. 144a n.58, 126a n.46. Other examples include similar operations by trucker/warehousemen Marty's Express Inc. and D. D. Jones Transfer and Warehouse Co., Inc. Jones, Marty's and Mahon actually break down cases of cargo, which have been re-

Footnote continued—

house" in connection with a warehouse account which called for the payment of "normal warehouse storage fees for a minimum period of 30 or more days." Pet. App. 225a-226a. However, beginning with the 1975 edition of the Rules the ILA engrafted upon normal warehousing practice the additional and unnatural condition that the warehouseman "store[s] the cargo for a minimum period of 30 days" as proof of "bona fide public warehouse" work. Pet. App. 232a. The undisputed facts are that a substantial proportion of warehoused cargo historically was forwarded within the 30 day period, even though some of the cargo may be stored for indefinite periods of time, and that requiring storage for 30 days "is often incompatible with the consignee's need to meet customer demand." Pet. App. 138a, 141a; Jt. App. 15, 96, 135.

moved from containers, and deliver to retail outlets individual pieces of merchandise, either immediately or after some indefinite period of storage, upon instructions of their customers. Jt. App. 43-44, 68-69, 71, 96-97.

The advent of modern containers brought no change in these historic warehouse transportation functions. The physical work consisting of loading, unloading, sorting and consolidating cargo and the purpose of this work remained the same; only a change of equipment occurred —the size of the cargo container increased. Jt. App. 53-55, 83-87, 98-99, 134-135. There is simply no evidence that the functions served by short-stopping and specialty warehousing were ever part of traditional longshore functions.

C. The Court Of Appeals Erred In Equating A Physical Resemblance In Job Skills Or Duties With A Historical And Functional Relationship Between Traditional ILA Work And The Work Claimed By The Rules.

After erroneously asserting that the Board had found all of the work sought by the Rules to be historically and functionally related to traditional ILA work, the court of appeals compounded its error by asserting that the Board "could not have concluded otherwise." Pet. App. 25a. The court defended this startling assertion with the observation:

> Traditionally, longshoremen loaded cargo piece by piece into the hold of the ship and unloaded it piece by piece from the hold. The Rules grant them the right in certain instances to load cargo piece by piece into containers and unload it piece by piece from containers. In short, containerization has simply

changed the locus of the work, moving the operation shoreward.

Pet. App. 25a. The court obviously considered a historical and functional relationship between traditional ILA work and the work sought by the Rules to be established merely by virtue of the fact that both types of work require similar job skills or duties, i.e., the loading of cargo "piece by piece." Pet. App. 25a.

The court of appeals' application of the historical and functional relationship test is clearly at odds with this Court's decision in *ILA I*. This Court fully recognized in *ILA I* that "the work of stuffing and stripping containers is similar to work previously done by both longshoremen and truckers." *ILA I,* 447 U.S. at 508. If this Court had shared the view of the court of appeals that this similarity in work duties established a historical and functional relationship between traditional ILA work and all of the work sought by the Rules, there would have been no need for this Court to remand the case to the Board.[21]

In *ILA I,* this Court cautioned that "the analysis is not, as the parties have sometimes seemed to suggest, simply a matter of deciding whether a container is more like the hold of a ship or more like a big box." *ILA I,* 447 U.S. at 509 n.23. The analysis of the court of appeals is guilty of precisely the error identified by this Court by simplistically equating the container with the hold of the ship moved shoreward. Pet. App. 25a.

21. The holdings of such cases as *Meat and Highway Drivers Local 710 v. NLRB,* 335 F.2d 709 (D.C. Cir. 1964), which upheld the lawfulness of a work allocation clause seeking admittedly "non-traditional work" on the ground that the work claimed "is of a type which the men in the bargaining unit have the skills and the experience to do," clearly have been overruled by this Court's adoption in *ILA I* of the historical and functional relationship standard.

The court of appeals failed to recognize that the application of the historical and functional relationship standard requires an examination of the *purpose* of traditional ILA work and modern container work and a comparison of their respective roles in the freight transportation system as a whole. The court declined to undertake this analysis and ignored the thorough findings of the ALJ, who carefully compared the purpose and function of traditional ILA work to each category of work sought by the Rules. The court of appeals' sweeping and summary analysis ignores this Court's caution that "the result will depend on how closely the parties have tailored their agreement to the objective of preserving the essence of the traditional work patterns." *ILA I,* 447 U.S. at 510 n.24. This Court thereby recognized that some of the work sought by the Rules might be historically and functionally related to traditional ILA work while other categories of work might not be, even though all the work sought by the Rules involved the loading of cargo piece by piece into containers. *Id.*

In *ILA I,* this Court recognized that distance as well as purpose could affect the definition of function by noting that if the ILA attempted to follow containers around the country and "assert the right to stuff and strip them far inland," the work claimed by the ILA "would bear an entirely different relation to traditional longshore work, and would require a wholly different analysis." *ILA I,* 447 U.S. at 510 n.24. The rationale of the court of appeals, however, would subsume even this situation. No matter how far inland the containers were moved, it would still be true that some employee would be stuffing and stripping the container "piece by piece," and therefore, according to the court of appeals, the Board "could not conclude otherwise" than to hold that the container work was

historically and functionally related to traditional ILA work. This result is clearly contrary to *ILA I*.

The Board, unlike the court of appeals, recognized even before *ILA I* that the maximum utilization of skills is not the watchword for a work preservation analysis. In *Teamsters Local 282 (D. Fortunato, Inc.)*, 197 NLRB 673 (1972), Local 282 members traditionally performed inter-construction site driving and delivered supplies to project sites from local suppliers. Changes in the construction industry, however, eliminated many local suppliers and contractors began receiving prefabricated material shipped by out-of-state suppliers directly to the contractors' projects. Direct shipment of supplies eliminated the need for some of Local 282's traditional delivery work. The union responded by negotiating an agreement requiring contractors to assign to Local 282 members alone the work of driving trucks to, from or on construction sites. The Board found that Local 282's members had not traditionally done all the work sought by the agreement, and concluded that a mere physical similarity between Local 282 members' traditional work and the driving work sought by the agreement could not establish a work preservation objective:

> [T]he driving work which the unit employees here perform is considerably more limited than that which they seek to preserve. The fact that the driving of one truck may well be similar to, and require like skills as, the driving of any other truck does not persuade us that all driving work is therefore "fairly claimable" by a unit of drivers.

197 NLRB at 678. As in *Fortunato,* the fact that traditional longshore work bears a physical resemblance to the work sought by the Rules does not establish that the Rules have a lawful work preservation objective. *Accord, Plumbers and Steamfitters Local Union 342 (Conduit Fabricators, Inc.)*, 225 NLRB 1364 (1976), *remanded,* 598 F.2d 216 (D.C. Cir. 1979); *supplemental opinion,* 251 NLRB 794 (1980); *Sheet Metal Workers Union, Local 162 (Associated Pipe and Fittings Mfrs.)*, 207 NLRB 741 (1973).

D. The Court Of Appeals Erred In Holding That The Rules Must Be Held Lawful Absent A Finding That The Rules Deprive Motor Carriers And Warehouses Of Work.

The court of appeals held that the Rules cannot be unlawful in any respect absent a finding that they deprive off-pier motor carriers and warehouses of work. Pet. App. 27a-28a. Disagreeing with the Board's conclusion that loading and unloading FSL containers by motor carriers and warehousemen was work beyond the lawful reach of the Rules, the court of appeals stated:

> Prior to containerization, truckers and warehousemen handled the cargo break-bulk; unloading of the cargo from the hold of the ship by the longshoremen obviously did not hinder these off-pier practices. Thus, one cannot possibly maintain that the stripping of import containers at the pier would in any way prevent the identical off-pier work. To repeat, truckers and warehousemen do precisely what they did before the change in technology; the longshoremen have acquired none of that work. Although the longshoremen's work in this process may well duplicate the off-pier work of truckers and warehousemen, calling this set of circumstances "work acquisition" strikes us as particularly inappropriate.

Pet. App. 28a.

In so holding the court of appeals misapplied the mandate of *ILA I*. There this Court emphasized that §8(b)(4)(B) prohibits "activities whose object is to force one employer to cease doing business with another," and that §8(e) prohibits "bargaining agreements in which the employer agrees to cease doing business with any other person." *ILA I*, 447 U.S. at 503-504. In no way did the Court suggest that the outcome of the case depended upon the *effect* of the Rules on the off-pier businesses or whether they lost work to the piers. To the contrary, the Court made it clear that the impact of the Rules on the work opportunities of off-pier businesses was "irrelevant to the validity of the agreement." *ILA I*, 447 U.S. at 507 n.22. The Court clearly held that the two relevant tests of legality were first, whether the work in dispute was historically and functionally related to traditional ILA work, and second, whether the VOCCs possess the right to control the disputed work. *ILA I*, 447 U.S. at 504. Thus, the Board's finding that the motor carrier and warehouse work sought by the Rules was not historically and functionally related to traditional ILA work is of itself sufficient to establish the unlawfulness of this aspect of the Rules. No additional finding that motor carriers and warehouses lost work is necessary.

The court of appeals placed undue emphasis on the concept of "work acquisition." This term has been used to help define an unlawful secondary objective, as in *National Woodwork*, 386 U.S. at 630-31, but it has never been adopted by the Board or the courts as an independent legal test of compliance with §8(b)(4) until adopted below by the court of appeals. Clearly, this Court, in *ILA I*, was well aware that the Rules sought to claim for ILA labor "the utterly useless task of removing the contents and then repacking them . . . [which] is nothing

less than an invidious form of 'featherbedding' to block full implementation of modern technological progress." *ILA I*, 447 U.S. at 526-527 (dissenting opinion). If the Court had felt that this duplication of container work on the pier and at the motor carrier's freight station prevented the Rules from having a secondary objective, there would have been no need to remand the case.

The proscribed secondary objective is established, in the language in the Act, by the pressure the ILA placed on the steamship lines to force them "to cease doing business with any other person," including motor carriers and warehouses. Work preservation is permitted only where the union's conduct is not "tactically calculated to satisfy [its] objectives elsewhere," whether or not those objectives are to deprive the employer with whom the real dispute exists of its work. *National Woodwork*, 386 U.S. at 644; *NLRB v. Enterprise Assn. of Steam Pipefitters, Local No. 638*, 429 U.S. 507, 528 (1977). Furthermore, this Court has held that the object of a union's activity does not have to be a complete cessation of business; a violation occurs when a union coerces the neutral employer to merely change its method of doing business with the targeted employer. *NLRB v. Local 825, Operating Engineers*, 400 U.S. 297, 304 (1971). Since the enforcement of the Rules requires the steamship lines to cease doing business with motor carriers and warehouses by denying them access to containers, it is unnecessary and contrary to the decisions of this Court to examine the impact of such enforcement on the work of motor carriers and warehouses.

Assuming, *arguendo*, that the loss of work by motor carriers and warehouses is relevant to the lawfulness of the Rules, the court of appeals' assumption that no loss of work would occur is factually unsupportable. Motor car-

riers and warehouses within 50 miles of the pier would certainly lose a significant volume of work if the Rules were enforced. By eliminating break bulk handling at the pier, containerization allowed the shipment of types of commodities which could not previously be shipped due to special handling requirements or an excessive risk of loss or damage. Jt. App. 99. This work would be lost if the container could no longer be used as it presently functions. Other work would be lost because the added cost of duplicate handling at the pier would cause certain shipping patterns to be unprofitable; container work would simply be moved outside the fifty-mile zones.[22] Jt. App. 59-60, 93, 101, 115-116, 125, 131-132, 136-137. If this were not so, the Rules would not contain a provision addressed to the avoidance of the Rules by movement of consolidation operations beyond the 50-mile perimeter. Pet. App. 228a.

Thus, the true and undisputed facts are that many motor carriers and warehousemen operating within the 50-mile zones will be financially devastated by the enforcement of the Rules because there will be no duplication of work opportunities. The work will be altogether lost by motor carriers and warehouses within the 50-mile zones.[23] These undisputed facts support the ALJ's finding that "application of the Rules [with respect to short-stopping and specialty warehousing] is viewed as an attempt to offset job losses on the piers by disrupting inland work patterns." Pet. App. 137a. The clear goal of the

22. The contention of the Respondents, that "[t]he change in business practices which would constitute the 'cessation of business' element of the Board's trucking and warehouse rulings in this case is minimal," is preposterous. Shipping Group Brief in opposition to Petition for Certiorari, Addendum at 9 n.8.

23. Motor carriers and warehousemen are not fungible entities. The fact that a motor carrier or warehouseman outside the 50-mile zone may handle the break-bulk cargo is no consolation to those within the zone who have lost work.

Rules is to prevent motor carriers and warehousemen from performing container work in the hope that customers will transfer that work to the piers rather than beyond the 50-mile perimeter. Such an object is proscribed by Sections 8(b)(4)(B) and 8(e).

CONCLUSION

The judgment of the court of appeals should be reversed and the Decision and Order of the Board should be enforced. Substantial evidence supports the ALJ's findings, adopted by the Board, that short-stopping and specialty warehouse work is not functionally related to traditional ILA work. Therefore, the attempt to interdict this work for the benefit of longshoremen by the enforcement of the Rules violates the secondary boycott provisions of the Act, irrespective of the amount of work lost or the economic impact of the enforcement of the Rules on the off-pier transportation functions.

Respectfully submitted,

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(14)

No. 84-861

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
AFL-CIO, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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MOTION OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of respondents. The AFL-CIO has sought, but been unable to obtain, the consent of all of the parties to the filing of that brief.

INTEREST OF THE AMICUS CURIAE AND THE ISSUES COVERED IN THE BRIEF

The AFL-CIO is a federation of 95 national and intentional labor organizations representing approximately 13,000,000 working men and women. These unions engage in collective bargaining in an effort to protect and advance the interests of the workers they represent. One of the

principal interests of working men and women is job security. That interest is placed in particular jeopardy by technological change which causes job displacement; accordingly, it has become a commonplace in collective bargaining for the parties to address the issues posed by such change.

The question presented in the instant case concerns the extent to which unions and employers are free, through collective bargaining, to respond to the challenge of innovations in the workplace. The National Labor Relations Board argues that while the federal labor law permits solutions designed to save jobs by preserving work previously performed by members of the bargaining unit, the law does not permit the parties to provide that the employer will reassign to the bargaining unit work that he had contracted out from the beginning in lieu of the work displaced by technological change.

It is the AFL-CIO's position that the work-preservation/work-acquisition dichotomy is inconsistent with the basic principles of the federal secondary boycott provisions and produces results incompatible with the overall policy of the labor laws. The Federation seeks leave to file the accompanying brief *amicus curiae* in order to so demonstrate.

CONCLUSION

For the foregoing reasons, this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") files this brief *amicus curiae* contingent upon the granting of the foregoing motion for leave to file said brief. The interest of the *amicus curiae* is stated in the motion.

SUMMARY OF ARGUMENT

The National Labor Relations Board states the question presented here as "whether the Rules on Containers . . . 'seek[] no more than to preserve the work of bargaining unit members' or instead seek to . . . 'acquir[e] for [the ILA's] members work that had not previously been theirs.'" We agree with respondents that the court of appeals' answer to that question is correct—that the

Rules are work preservative in their intent. But in our view, posing the question in these terms needlessly complicates, and tends to distort, legal analysis of the issue presented.

The overriding aim of the national labor policy is to encourage employers and unions to enter into collective bargaining agreements that establish the terms and conditions of employment for the employer's employees. The secondary boycott laws, including § 8(e), were not intended to undermine that aim; the intent of those laws is to "shield[] unoffending employers and others from pressure in controveries not their own." *Labor Board v. Denver Building Council*, 341 U.S. 675, 692 (1951). Accordingly, the settled test for determining whether an agreement (or concerted activity) is primary or secondary is "whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-à-vis* his own employees." *Woodwork Manufacturers v. NLRB*, 386 U.S. 612, 645 (1967). Pp. 4-9 *infra*.

The work-preservation/work-acquisition dichotomy is inconsistent with this established test. By focusing attention on a factor that has no relevance in determining whether an agreement is primary or secondary—the past pattern of work distribution—the preservation/acquisition dichotomy imposes a rigid straightjacket that interferes with collective bargaining and that can lead to the condemnation of primary agreements. These results are unnecessary, because the "right-of-control" test as announced in *NLRB v. Pipefitters*, 429 U.S. 507 (1977), in itself, assures against neutrals becoming embroiled in labor disputes not their own. Pp. 9-12 *infra*.

In addition to its analytic flaws, the work-preservation/work-acquisition dichotomy creates significant practical difficulties. That dichotomy virtually defies principled application in a situation in which technological advances

have altered the nature of the work to be performed; it therefore provides no meaningful guidance to unions and employers seeking to conduct their affairs in accordance with the requirements of the law. Thus, while work acquisition agreements may, in particular circumstances, violate other provisions of the labor laws—and may violate § 8(e) if the union is seeking to acquire work over which the immediate employer has no control—there is no basis for holding that such agreements are *per se* unlawful under § 8(e). Pp. 13-15 *infra*.

Nothing in this Court's prior decisions compels the work-preservation/work-acquisition dichotomy. To the contrary, the Court repeatedly has concluded that the lawfulness of any agreement under § 8(e) turns on whether the agreement is primary or secondary, applying the general test set forth in *National Woodwork*. And since *Pipefitters* the Court has made clear that under that test a critical threshold inquiry is on the locus of control of the work in question rather than on the past pattern of work distribution. Pp. 15-21 *infra*.

Applying the *National Woodwork/Pipefitters* test, this case is easily resolved. There is no doubt that the Rules on Containers are both "addressed to the labor relations of the contracting employer[s] *vis-à-vis* [their] own employees," and seek the assignment of work over which the contracting employers have the right of control; indeed the NLRB expressly so found in sustaining most applications of the Rules. Accordingly, the judgment of the court of appeals sustaining those Rules *in toto* should be affirmed. Pp. 21-22 *infra*.

ARGUMENT

A. The opinion of the National Labor Relations Board in the instant case begins by posing the question for decision as follows:

> The question presented in this case is whether the Rules of Containers negotiated by the International Longshoremen's Association (ILA) with the various employer associations representing east coast shipping lines in response to the technological innovation of containerized shipping are merely an attempt to preserve work historically performed by longshoremen represented by the ILA or instead are an effort to acquire for longshoremen represented by the ILA work which is not functionally related to their traditional work. [266 NLRB 230, 231]

The Board, in addressing that question, concluded that in most respects the Rules on Containers do preserve traditional longshore work, *id.* at 236, but that the Rules as applied to "shortstopping" (*i.e.*, pre-delivery stripping of a container destined for only one consignee) and to certain warehouse practices acquire for longshoremen work not functionally related to their traditional work. In the latter regard the Board emphasized that by reason of containerization the work in question (on-pier stripping of the containers) "no longer exists as a step in the cargo-handling process." *Id.* at 237.

In reversing the Board, the court of appeals addressed the question the Board had posed in its decision, but concluded that the Board had erred as a matter of law in its answer to that question:

> Prior to containerization, truckers and warehousemen handled the cargo break-bulk; unloading of the cargo from the hold of the ship by the longshoremen obviously did not hinder these off-pier practices. Thus, one canot possibly maintain that the stripping of import containers at the pier would in any way prevent the identical off-pier work. To repeat, truckers and warehousemen do precisely what they did before the change in technology; the longshoremen have acquired none of that work. Although the longshoremen's work in this process may well duplicate the off-pier work of truckers and warehousemen, calling this set of circumstances "work acquisition" strikes us as particularly inappropriate. [734 F.2d 966, 979]

In this Court, the Board again states the question presented as being "whether the Rules on Containers . . . 'seek[] no more than to preserve the work of bargaining unit members' or instead seek to . . . 'acquir[e] for [the ILA's] members work that had not previously been theirs.'" NLRB Br. at 27 (citations omitted); *see also* Teamsters Br. at 26. We agree with respondents that the court of appeals' answer to that question is the correct one—that the Rules on Containers do preserve work for longshoremen represented by the ILA.

But in our view, posing the question in these terms both needlessly complicates, and tends to distort, legal analysis. For, as we proceed to show, the issue here is whether the agreement is primary or secondary in nature. If the agreement is primary—*viz.* is "addressed to the labor relations of the contracting employer *vis-à-vis* his own employees," *Woodwork Manufacturers v. NLRB*, 386 U.S. 612, 645 (1967)—§ 8(e) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(e), presents no legal bar; indeed, the overriding aim of the national labor policy is to encourage employers and unions to enter into collective bargaining agreements which establish the terms and conditions of employment for the employer's employees represented by the union. The work-preservation/work-acquisition dichotomy impedes, rather than aids, resolution of § 8(e) cases by focusing attention on the fortuity of prior patterns of work distribution rather than on the basic threshold consideration of whether the employees are seeking work from their employer over which the employer has the right to control.

B. We begin our analysis with the fundamental proposition that "the keystone of the federal scheme to promote industrial peace" is the "ordering and adjusting of competing interests through a process of free and voluntary collective bargaining." *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962). As Chief Justice Hughes explained shortly after the Wagner Act was passed: "The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining." *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 237 (1938). To accomplish that "manifest objective" the Wagner Act establishes a duty to bargain and also leaves each party to the bargaining process free to use "economic pressure devices . . . to make the other party incline to agree on one's terms." *Labor Board v. Insurance Agents*, 361 U.S. 477, 489 (1960). Thus, "[t]he presence of economic weapons in reserve and their actual exercise on occasion by the parties, is part and parcel of the system" of collective bargaining. *Id.*

In 1947 Congress enacted the Labor Management Relations Act ("LMRA") which altered the collective bargaining system established by the Wagner Act by, *inter alia*, proscribing the use of economic weapons where "an object thereof is . . . forcing or requiring any employer . . . . to cease doing business with any other person." LMRA § 8(b)(4)(A), 61 Stat. 136. While the literal language of that provision standing alone could have been read to ban, *e.g.*, primary picketing of a struck employer, this Court has repeatedly recognized that Congress had the narrower intent of forwarding the "dual congressional objectives of preserving the right of labor organizations to bring primary pressure to bear on offending employers and of shielding unoffending employers and others from pressures in controversies not their own." *Labor Board v. Denver Bldg. Council*, 341 U.S. 675, 692 (1951). *See also, e.g., Labor Board v. Rice Milling Co.*, 341 U.S. 665, 672 (1951); *Electrical Workers v. Labor Board*, 366 U.S. 667, 672 (1961).

Twelve years after the enactment of the LMRA, Congress passed the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") which "close[d] various loopholes in the application of § 8(b)(4)(A) which had been exposed in Board and Court decisions." *National Woodwork, supra*, 386 U.S. at 633. One of those "loopholes" was the product of *Carpenters Union v. Labor Board*, 357 U.S. 93 (1958) (*Sand Door*). There the Court had held that, as written, § 8(b)(4)(A) of the LMRA did not prohibit a union and employer from entering into a collective bargaining agreement restraining the signatory employer from doing business with another employer, even if the purpose of such an agreement was to involve the signatory employer in "controversies not [his] own." Section 8(e) was enacted to fill that gap in the law by proscribing such "hot cargo" agreements.

Like the LMRA's § 8(b)(4)(A), the LMRDA's § 8(e) was drafted to outlaw any contract provision in which an employer "agrees to . . . cease doing business with any other person." In *National Woodwork* this Court held that in enacting § 8(e) Congress did not intend to "expand the type of conduct which § 8(b)(4)(A) condemned." 386 U.S. at 365. The Court found that the legislative history of § 8(e) "defined the evil to be prevented in terms of agreements which obligated neutral employers not to do business with other employers involved in labor disputes with the union." *Id.* at 636. And the *National Woodwork* Court added:

> [I]mportant parts of the historic accommodation by Congress of the powers of labor and management are §§ 7 and 13 of the National Labor Relations Act, passed as part of the Wagner Act in 1935 and amended in 1947. The former section assures to labor "the right . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of col-

lective bargaining or other mutual aid or protection. . . ." Section 13 preserves the right to strike, of which the boycott is a form, except as specifically provided by the Act. *In the absence of clear indicia of congressional intent to the contrary, these provisions caution against reading statutory prohibitions as embracing employee activities to pressure their own employers into improving the employees' wages, hours, and working conditions.* [*Id.* at 643; emphasis added]

The *National Woodwork* decision goes on to articulate a test for distinguishing primary agreements and boycotts from secondary ones—a test based upon the congressional understanding of the primary-secondary distinction: "The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-à-vis* his own employees." *Id.* at 645. Where that touchstone is satisfied the agreement and its maintenance are primary. But where "the tactical object of the agreement and its maintenance is [another] employer or benefits to other than the . . . employees of the primary employer—the agreement or boycott [is] secondary." *Id.* In a companion case decided on the same day, the Court restated the test as follows: "*National Woodwork Manufacturers* holds that collective activity by employees of the primary employer, the object of which is to affect the labor policies of that primary employer, and not engaged in for its effect elsewhere, is protected primary activity." *Houston Contractors Ass'n v. NLRB*, 386 U.S. 664, 668 (1967).

The *National Woodwork* test has been consistently followed in the Court's subsequent § 8(b)(4) and § 8(e) decisions. *See NLRB v. Pipefitters*, 429 U.S. 507, 528 (1977); *NLRB v. Longshoremen*, 447 U.S. 490, 504 (1980). In *Pipefitters* the Court elaborated upon this test in the course of holding that employees of a heating subcontractor had acted unlawfully in refusing to handle prefabricated climate control units which the subcontractor was required to install on a particular construction project by virtue of the subcontractor's contract with the general contractor. The Court concluded that since the general contractor controlled whether the fabrication work on the climate control units would be done on the construction site or at a factory, "[b]y seeking the [fabricating] work at the [construction project in question], the union's tactical objects necessarily included influencing [the general contractor]; this conduct falls squarely within the statement of *National Woodwork* that a union's activity is secondary if its tactical object is to influence the boycotted employer." *NLRB v. Pipefitters*, *supra*, 429 U.S. at 529-30 n. 16. This " 'right-of-control' test of *Pipefitters*," *NLRB v. Longshoremen*, *supra*, 447 U.S. at 504, is now an essential part of the inquiry mandated by *National Woodwork*.

C. The work-preservation/work-acquisition dichotomy is inconsistent with the established test for assessing whether an agreement or conduct is primary or secondary and with the fundamental principles that test embodies. Moreover, the preservation/acquisition dichotomy can lead to the condemnation of primary, concerted activity and primary collective bargaining agreements notwithstanding Congress' desire to protect such activity and such agreements. This is true for a very simple reason: the distinction between work preservation and work acquisition turns on factors that have no relevance in determining whether the union's conduct, or the collective agreement, is primary or secondary.

As the very terms imply, the preservation/acquisition dichotomy focuses attention on the pattern of work distribution that existed in the past, before a challenged agreement was signed or economic pressure was exerted. The first step is to identify "the 'work' that [an] agreement allegedly seeks to preserve," *NLRB v. Longshoremen*, *supra*, 457 U.S. at 505; where there has been a technological innovation, this requires identifying "the

work as it existed before the innovation," *id.* at 507. Under this approach the past imposes a rigid straightjacket on collective bargaining; any attempt by a union to go outside the preexisting work-allocation lines invites the label "work acquisition."

The point is perhaps best made by considering two hypotheticals:

> Manufacturer A operates a plant at which the custodial work has historically been done by A's employees. A receives a proposal from a firm that does janitorial work to do A's work on a contract basis; A concludes that it would be cheaper to accept this proposal and to subcontract for janitorial services. The union representing A's employees engages in concerted activity to prevent A from entering into the subcontracting arrangement and eventually secures an agreement precluding the subcontracting of the custodial work.
>
> Manufacturer B operates a plant at which a subcontractor has historically performed the custodial work. B desires to introduce new technology into its manufacturing process which will significantly reduce the number of B's employees. The union representing B's employees secures from B an agreement to cease subcontracting the janitorial work and to assign that work instead (at no increased cost to B) to bargaining-unit employees who would otherwise be laid off.

As we understand the work-preservation/work-acquisition dichotomy, the hypothesized agreement with employer A would be a lawful work-preservation agreement whereas the hypothesized agreement with employer B would be an unlawful work-acquisition agreement. But from the perspective of the secondary boycott laws, that distinction makes no sense. The union's objective in each instance is precisely the same: that the employer do its own janitorial work through the employer's own employees. And, in each instance, the employer has the right of control over that work.

Moreover, the conclusion required by the preservation/acquisition dichotomy—that agreement A is primary and agreement B secondary—has two untoward results.

First, that conclusion makes collective bargaining more difficult by placing added pressure on unions to resist any and all proposals to contract out work the employer could do with his own employees. The stakes are entirely different if the consequence of an agreement permitting the employer the flexibility to contract out is that work once surrendered cannot be reacquired without running afoul of the secondary boycott laws than if the parties are free to continually explore in light of changing circumstances the extent to which the employer should do his own work with his own employees.[1]

Second, as the hypothetical situation of employer B illustrates, the preservation/acquisition dichotomy interferes in particular with the parties' ability to respond to technological change by assigning to a bargaining unit in lieu of work that is being displaced by automation a

[1] The adverse consequences described in text are limited to the extent the work preservation doctrine permits work recapture. *See, e.g., American Boiler Mfrs. Ass'n v. NLRB*, 404 F.2d 547 (8th Cir. 1968), *cert. denied*, 398 U.S. 960 (permitting work recapture clause so long as work was not "completely lost before the clause was negotiated"); *Meat and Highway Drivers Local 710 v. NLRB*, 335 F.2d 709 (D.C. Cir. 1964). But the Board has held that work recapture is not permissible where the union previously "abandoned" its claim to the work in question by agreeing to the subcontracting of that work, *International Longshoremen's Association*, 221 NLRB 956, 960 (1975), *enf'd*, 537 F.2d 706 (2d Cir. 1976); that holding has all of the consequences described in text.

The "work recapture" principle also magnifies the anomalies inherent in the preservation/acquisition dichotomy. Under that principle—which, in certain circumstances, treats recapture as preservation rather than acquisition—a union demand that an employer that has subcontracted out work cease doing so may be held to be primary or secondary, depending upon how long ago the subcontract was made and how completely the work has been subcontracted. Yet these circumstances have nothing to do with the purposes of the secondary boycott laws.

part of the employer's work that previously had been contracted out. The preservation/acquisition dichotomy is thus inconsistent with "[t]he national labor policy [which] expresses a preference for addressing 'the threats to work posed by increased technology and automation' by means of 'labor-management agreements to ease these effects through collective bargaining on this most vital problem created by advanced technology.'" *NLRB v. Longshoremen, supra*, 447 U.S. at 505.

Nothing in the purposes underlying the secondary boycott laws requires, or even supports, these results. To repeat the lesson of *Denver Building Council* and its progeny, the secondary boycott laws were designed to "shield[] unoffending employers and others from pressure in controversies not their own." P. 6 *supra*. In the class of situations at issue here, the right-of-control test, standing alone, assures that result: that test precludes a work-allocation agreement (whether one to preserve or acquire work) unless the employer has control over the work being allocated, and the test also precludes the use of economic pressure to enforce such an agreement where the employer lacks control over the particular work at issue. But, in contradistinction to the preservation/acquisition dichotomy, the right-of-control test does recognize that a union that seeks an agreement with an employer by which the employer would use his own employees to do the employer's work—*viz.* work over which the employer has the right of control—even if that work previously was done by others, is "address[ing] . . . the labor relations of the contracting employer *vis-à-vis* his own employees" and, thus, is engaging in primary activity.

In sum, in light of the right of control test, the preservation/acquisition dichotomy is unnecessary to achieve the aims of the secondary boycott laws. And that dichotomy, by focusing attention on past work distribution practices, introduces an irrelevant and misguided inquiry into § 8(b)(4) and § 8(e) analysis.

D. Aside from its analytic flaws the work-preservation/work-acquisition dichotomy also creates significant practical problems: that dichotomy virtually defies principled application in a situation in which technological advances have altered the nature of the work to be performed. Consequently, the dichotomy provides no meaningful guidance to unions and employers seeking to conduct their affairs in accordance with the requirements of the law.

The difficulties in applying the preservation/acquisition dichotomy are well-illustrated by the tortured history of this litigation over the Rules on Containers. As the Board states in its brief, "in determining the lawfulness of the Rules the Board has been faced with the task of assessing the extent to which the Rules preserved 'the essence of traditional work patterns' in a setting in which work patterns have been radically altered by containerization." NLRB Br. at 27. And that task has been made even more complicated by the fact that "the impact of containerization occurred at the interface between ocean and motor transport; not surprisingly, the work of stuffing and stripping containers is similar to work previously done by both longshoremen and truckers." *NLRB v. Longshoremen, supra*, 447 U.S. at 508. The result has been a decade of litigation all designed to determine whether the Rules on Containers are work-preservational.

The lesson of this litigation for other unions and employers is equally troubling. Under the preservation/acquisition line of analysis as applied in this case, where, as here, new technology has "changed the method of doing the work," *id.* at 505, in order to determine the lawfulness *vel non* of a proposed agreement to allocate the modified work to a particular unit of employees, a union and employer must anticipate the answer the Board and the courts will ultimately give to whether "the historical and functional relationship between th[e] retained work and [the] traditional . . . work can support the conclu-

sion that the objective of the agreement was work preservation." *Id.* at 510. As the instant case well illustrates, that is not an inquiry whose outcome can be readily predicted in advance.

In contrast, the test of *National Woodwork* and *Pipefitters* provides much clearer guidance to the parties to a collective bargaining relationship. Under that test, the parties may enter into and the union may enforce an agreement which allocates work over which the employer has control; they may not do so with respect to work as to which some other entity has control. This test thus frees the parties to bargain over matters within the employer's control, thereby accommodating both the congressional decision to establish a system of collective bargaining for "the ordering and adjusting of competing interests" of the employer and his employees, *Lucas Flour*, *supra*, 369 U.S. at 104, and, more specifically, "the congressional preference for collective bargaining as the method for resolving disputes over dislocations caused by the introduction of technological innovations in the workplace," *NLRB v. Longshoremen*, *supra*, 447 U.S. at 511.

E. Of course, the fact that, as we have just shown, a work-acquisition agreement is not necessarily secondary (if the immediate employer has control over the work in question) does not mean that such an agreement (or its enforcement) would be automatically lawful under *other* provisions of the labor laws. If, for example, a union seeks to acquire work that had never previously been performed by anyone because the work is unnecessary, the union's conduct would have to be tested under § 8(b)(6), the provision of the LMRA governing featherbedding (although it is noteworthy that this provision was narrowly drawn by Congress so as to leave the parties to a collective bargaining relationship free, in the main, to decide what work is necessary and what unnecessary). Similarly, if a union seeks to acquire work at the expense of the employer's employees in an-

other union, the union's action would be subject to invalidation under the provisions governing jurisdictional disputes, § 8(B)(4)(D) and § 10(k).

But the fact that a work acquisition agreement, or its enforcement, may in certain circumstances violate these other provisions does not mean that such an agreement or conduct also violates the secondary boycott provisions of the Act. To the contrary, the very fact that Congress enacted §§ 8(b)(4)(D) & 8(b)(6) which reguate particular aspects of work-aquisition efforts confirms our contention that a work acquisition agreement is not *per se* violative of § 8(e) but rather must be measured against the overall standard that separate primary from secondary agreements.

F. Nothing in this Court's prior decisions forecloses the analysis set forth above or compels the Board's conclusion that work acquisition is *per se* secondary. On the contrary, the prior cases, fairly read, support our analysis.

1. *National Woodwork* is sometimes said to be the genesis of the preservation/acquisition dichotomy and to support the proposition that work acquisition is by definition secondary. But that is not at all what *National Woodwork* teaches.

At issue in *National Woodwork* was a work preservation agreement between a general contractor and a carpenters union whose members had traditionally done the work of cutting and fitting doors; the agreement provided that carpenters would not handle (*viz.*, install) prefabricated doors, effectively precluding the contractor from doing business with door manufacturers. The Board sustained the agreement but the Seventh Circuit reversed, holding that the agreement "violated § 8(e) without regard to any 'primary' or 'secondary' objective." 386 U.S. at 618.

The issue posed to this Court in *National Woodwork* thus was whether § 8(e) is to be read literally to proscribe all collective bargaining agreements which contain a provision to "refrain from handling . . . any of the products of any other employer," or whether § 8(e) is to be read to prohibit only such agreements that are secondary in nature. The Court reached the latter conclusion, and formulated the general test for distinguishing primary from secondary activity on which we rely here. *See* pp. 7-8 *supra*.

To be sure, in the course of its analysis in *National Woodwork* the Court placed emphasis on the fact that the agreement at issue was designed to preserve work for the carpenters and the Court noted that if § 8(e) were read to proscribe primary as well as secondary agreements, as the Seventh Circuit had held, even work-preservation agreements would be rendered unlawful; the Court thought it especially unlikely that Congress would have intended, *sub silentio*, to achieve that result. *See* 386 U.S. at 840-42. But while this discussion—and other statements in the Court's opinion, *e.g.*, 386 U.S. at 645-46—could conceivably be read to suggest that the Court viewed all work-preservation agreements as *ipso facto* lawful, nothing in the Court's discussion of work preservation agreements indicates that the Court thought such agreements to be the *only* type of work allocation agreement that is primary and hence permissible under § 8(e). Indeed, elsewhere in its opinion the Court expressly reserved judgment on the lawfulness of work-acquisition agreements and their enforcement, stating "[w]e . . . have no occasion today to decide the questions which might arise where the workers carry on a boycott to reach out to monopolize jobs or acquire new job tasks when their own jobs are not threatened by the boycotted product." *Id.* at 630-31.[2]

[2] *National Woodwork* discussed work acquisition in the context of responding to the employers' reliance on *Allen Bradley Co. v. Union*, 325 U.S. 797 (1945), and on portions of the legislative history of the LMRA which the employers contended evidenced a congressional intent to incorporate the result reached in *Allen Bradley* into § 8(b)(4)(A). *See National Woodwork*, 386 U.S. at 628-30. (The Teamsters in the instant case make a similar argument, *see* Teamsters Br. at 28, 43-44.) It is therefore important to point out that in *Allen Bradley* the electrical workers union, in threatening to boycott electrical contractors which purchased electrical fixtures made by a non-union shop, was seeking to acquire work *not for the employees of the contractors but for employees of the fixture manufacturers*. As the Court stated in *National Woodwork*, "This is a secondary object because the cessation of business was being used tactically, with an eye to its effect on conditions elsewhere." 386 U.S. at 629. Thus, the fact that the type of work-acquisition activity involved in *Allen Bradley* is unlawful says nothing about whether work acquisition is secondary where the union seeks to acquire work for the employees engaged in the concerted activity and where the employer has control over the work being sought.

Thus, the ultimate lesson to be drawn from *National Woodwork* is that the lawfulness of a work-acquisition agreement or of economic pressure aimed at work acquisition, like the lawfulness of any other type of work allocation agreement or of any other type of concerted activity, turns on whether the union is engaged in primary or secondary activity—turns, in other words, on whether the "agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-à-vis* his own employees" or whether "the agreement and boycott were tactically calculated to satisfy union objectives elsewhere." *Id.* at 643-44.

2. That this is the correct reading of *National Woodwork* is confirmed by the Court's subsequent decision in *NLRB v. Pipefitters*, *supra*. In that case, the employees of the heating subcontractor, in refusing to install prefabricated climate-control units, were acting "for the purpose of preserving work they had traditionally performed." 429 U.S. at 514. Nonetheless, as previously noted, this Court affirmed the NLRB's conclusion that the refusal to install the units was secondary, and hence

violative of § 8(b)(4)(B), because the decision to use prefabricated units was not one within the control of the employee's own employer but rather was in the control of the general contractor, who had mandated prefabricated units; thus in refusing to install those units the union's "objectives were not confined to the employment relationship with [the subcontractor] but included the object of influencing [the general contractor] in a manner prohibited by § 8(b)(4)(B)." *Id.* at 531.

Of particular significance for present purposes is *Pipefitters'* treatment of the work-preservation defense that the union there raised. The Court made clear that the term "work preservation"—and, by logical implication, its counterpart "work acquisition"—is not a talisman whose incantation resolves cases arising under the secondary boycott laws. To the contrary, the Court labeled "untenable under the Act and our cases" the proposition that "where a union seeks to enforce a work-preservation agreement by a strike or work stoppage, the existence of the agreement would always provide an adequate defense to a § 8(b)(4) unfair labor practice charge." *Id.* at 515. The Court explained: "[e]ven though a work-preservation provision may be valid in its intendment and valid in its application in other contexts, efforts to apply the provision so as to influence someone other than the immediate employer are prohibited by § 8(b)(4)(B)." *Id.* at 521 n.8.

The Board here relies on dictum in a footnote in *Pipefitters* in which the Court responded to the dissent's argument that even though an aim of the pipefitters in refusing to install the prefabricated units was to induce the subcontractor to force the general contractor to use units that were not prefabricated, the boycott was nonetheless primary because the union's ultimate object was to benefit the subcontractor's employees. In rejecting that contention, the Court stated:

> *National Woodwork* did not . . . adopt this standard for applying the proscriptions of § 8(b)(4)(B). The distinction between primary and secondary activity does not always turn on which group of employees the union seeks to benefit. There are circumstances under which the union's conduct is secondary when one of its purposes is to influence directly the conduct of an employer other than the struck employer. In these situations, a union's efforts to influence the conduct of the nonstruck employer are not rendered primary simply because it seeks to benefit the employees of the struck employer.
>
> * * * *
>
> The *National Woodwork* opinion also noted that the Court then had no occasion "to decide the questions which might arise where the workers carry on a boycott to reach out to monopoloze jobs or acquire new job tasks." That reservation was apparently meaningless, for under the theory of the dissent . . . striking workers may legally demand that their employer cease doing business with another company even if the union's object is to obtain new work so long as that work is for the benefit of the striking employees. If, for example, [the subcontractor] had in the past used prepiped units without opposition from the union, and the union had demanded that [the subcontractor] not fulfill its contract with [the general contractor] . . .—all for the benefits of [the subcontractor's] employees—it would appear that the dissenters' approach would exonerate the union. . . . We disagree, for the union's object would necessarily be to force [the subcontrator] to cease doing business [with the contractor] not to preserve, but to aggrandize, its own position and that of its members. Such activity is squarely within the statute. [429 U.S. at 529-30 n.16.]

In its brief in this case, the Board seizes upon the last two sentences from the quoted passage and treats them as if they were a holding that whenever a union acts "to

aggrandize its own position" the union is engaged in secondary activity. But that is not a fair reading of even the literal words of the footnote; the Court's discussion of "aggrandizement" is in the context of a specific hypothetical the Court posited in which the subcontractor does *not* have the right of control over the work the union seeks to acquire. Moreover, the entire point of the footnote—as of the *Pipefitters* opinion as a whole—is to emphasize that the distinction between primary and secondary activity turns on whether the union seeks "to influence directly the conduct of an employer other than the struck employer." It thus would be a perversion of *Pipefitters* to conclude, as the Board does, that a work acquisition agreement is *per se* unlawful even if the agreement seeks to influence only the conduct of the immediate employer.

3. The only other precedent on which the Board relies is *NLRB v. Longshoremen, supra* (*"ILA I"*), this Court's prior decision in this case. That decision provides no sustenance to the Board.

The Court began its analysis there as follows:

> Although § 8(e) does not in terms distinguish between primary and secondary activity, we have held that, as in § 8(b)(4)(B), Congress intended to reach only agreements with secondary objectives.
>
> *Among the primary purposes protected by the Act* is "the purpose of preserving for the contracting employees themselves work traditionally done by them." [447 U.S. at 504; emphasis added; citations omitted]

The Court then proceeded to delineate the proper method of proceeding where a work-preservation purpose is proffered as a defense to a § 8(e) charge (stressing, *inter alia*, that "the contracting employer must have the power to give the employees the work in question—the so-called 'right of control' test of *Pipefitters*," *id.* at 504).

Because of the attention the Court devoted to the work preservation issue in *ILA I*, the effect of the decision may have been to focus the making of the record on the subsidiary questions implicated by that issue: identifying "the 'work' the agreement allegedly seeks to preserve," *id.* at 505, and determining "whether the historical and functional relationship between th[e] retained work and traditional longshore work can support the conclusion that the objective of the agreement was work preservation . . . ," *id.* at 510. Nonetheless, it is important to bear in mind that as the words we have italicized from the Court's opening sentences make clear, *ILA I* did *not* hold that a work-preservation agreement is the only type of agreement protected by § 8(e); that question simply was not presented to the Court in *ILA I*. And it is noteworthy that the Court twice cautioned that to find a violation of § 8(e) the Board would have to find that "the objective of the agreement was . . . the satisfaction of union goals elsewhere." *Id.* at 510; *see also id.* at 511.

In sum, this Court has never held that work-acquisition agreements are *per se* unlawful (or that work-preservation agreements are *per se* lawful). To the contrary, the Court repeatedly has concluded that the lawfulness of any agreement under § 8(e) turns on whether the agreement is primary or secondary, applying the general test set forth in *National Woodwork*. And since *Pipefitters* the Court has made clear that under that test the critical inquiry is on the locus of control over the work in question rather than on the past pattern of work distribution.

G. Once the proper test is applied, this case is revealed to be simple and straight forward. For as the Board concluded in upholding all but the applications of the Rules on Containers at issue here, "the shipping lines d[o] have the right to control the assignment of this [the stripping and stuffing] work, since they owned or leased the containers and could prescribe the conditions for re-

lease of these containers to shippers, consolidators, truckers, and warehouses." 266 NLRB at 234. The Board based this conclusion on subsidiary findings by the Administrative Law Judge which the Board affirmed, *see id.* at 230:

> Steamship companies and marine terminal operators have invested their capital and developed the technology which made containers available to the public and which increased their utility through specialized container vessels, container cranes, and other facilities contributing to a dramatically increased productivity on the docks. The wisdom and resources of contracting employers, exclusively, have made this technology available, and shippers, importers, and their agents are simply the beneficiaries, having played no part in the proliferation of this innovative trend. . . . [The Rules on Containers] w[ere] a response to restrain otherwise discretionary action of the immediate contracting employers, who, through their development of and control over the job-eroding technology, are the primary offenders of the job interests of their own employees. The ILA's effort to preserve their work through negotiated restrictions with respect to whom and under what conditions the container technology is to be released to outsiders relates directly to a labor relations problem within the primary work unit. Furthermore . . . said obligations are imposed upon signatory employers at a time when the latter possess power to comply. [*Id.* at 261]

Thus the Rules on Containers are a primary agreement and hence are lawful under § 8(e).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 84-861

In the Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, AFL-CIO, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
FOURTH CIRCUIT

REPLY BRIEF OF AMERICAN TRUCKING ASSOCIATIONS, INC., AND TIDEWATER MOTOR TRUCK ASSOCIATION IN SUPPORT OF PETITIONER

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ARGUMENT

The brief in opposition filed by Respondent International Longshoremen's Association and its allies, the maritime employers of longshoremen (hereinafter "the Shipping Group"), in support of the ILA's Rules on Containers obfuscates rather than sharpens the focus on the fundamental issues before the Court.

I. The Shipping Group Improperly Defines The Work In Dispute.

The Shipping Group repeatedly misdefines the work at issue in this case as "the stuffing and stripping of the longshore employers' containers *at the piers*." ILA Brief at 16-17, 18 & n.17, 29, 36 (emphasis added).[1] The Shipping Group suggests that the Board also defined the disputed work as being located "at the piers." ILA Brief at 17, 29. In fact, neither the ALJ[2] nor the Board held that the stuffing and stripping of containers "at the piers" is the work at issue. The Board explicitly defined the disputed work as the loading and unloading of all containers anywhere within the 50-mile zones. Pet. App. 57a. The Court of Appeals adopted this definition. Pet. App. 22a.

Clearly, the disputed work is not the stripping and stuffing of containers at the piers, but only that which is performed off-pier in violation of the Rules. By defining the disputed work as the stuffing and stripping of containers "at the piers," the Shipping Group seeks to transform neutral maritime employers of ILA labor into primary employers. Thus, the Shipping Group argues that the Rules cannot be "tactically calculated to satisfy union objectives elsewhere," because "the Rules do not address off-pier work," and "[t]here is no dispute between the longshoremen and the trucking employers." ILA Brief at 36.

1. Citations to the Brief of the Shipping Group will be "ILA Brief at ...." Citations to other briefs will be designated by the abbreviated name or acronym of the party sponsoring its submission.

2. The ILA misquotes the ALJ regarding the locus of the disputed work. ILA Brief at 17, 29. The ALJ stated "the 50-mile Rule is narrowly tailored to the stripping and stuffing of containers." He did not limit this work to work "at the piers." The ALJ then stated that the disputed work "was performed historically at the piers by deepsea ILA longshoremen, and elsewhere by either truckers, warehousemen, or consolidators, at inland points." Pet. App. 119a.

These arguments are incredible. The Rules do not prohibit steamship lines from releasing containers to all off-pier employers; they only come into effect when certain inland employers offend the ILA by stripping and stuffing containers in violation of the Rules.[3] Thus, the primary target of the Rules has always been those inland employers from whom the ILA seeks the disputed container work. The mere fact that the ILA would like to perform the disputed work on the piers, or that the Rules state that the disputed work shall be performed on the piers, does not control the definition of the disputed work or erase the fact that the disputed work has traditionally been performed off-pier.

In *NLRB v. International Longshoremen's Assn.*, 447 U.S. 490 (1980) (*"ILA I"*), this Court recognized the distinction between traditional longshore work and the disputed work. *ILA I*, 447 U.S. at 509, 510. The Court stated that this was not a case where disputed work had simply been transferred from the unit for performance elsewhere, but rather was a case where "technological innovation change[d] the method of doing the work, instead of merely shifting the same work to a different location." 447 U.S. at 505. The Court in *ILA I* did not mandate a definition of the work in dispute and certainly did not sanction the Shipping Group's definition of the work as the stuffing and stripping of containers at the piers. Rather, it repeatedly left the definition of the work to the Board on remand. 447 U.S. at 509 n.23, 511 n.26. The Board found as a matter of fact that the definition of the disputed work

3. The 1974 edition of Rules 1 and 2 defines the work in dispute as the work performed by motor carriers and warehousemen *away* from the piers. Pet. App. 224a-226a.

encompassed the off-pier stuffing and stripping of containers within 50 miles of the port. It is this off-pier disputed work which must be compared to traditional on-pier ILA work to determine the true objective of the Rules.

II. The Board Properly Applied The Functional And Historical Relationship Test In Considering Short-Stopping And Specialty Warehousing.

The Shipping Group inaccurately asserts in its brief that "there is no doubt" that the Board found the disputed short-stopping and warehousing work "to be functionally related to the traditional work of longshoremen and loading and unloading cargo on and off a ship for ocean transport." ILA Brief at 28. No language in the Board's decision states such a conclusion. In discussing the functional relationship of short-stopping work to traditional longshoremen's work the Board does state: "It is clear that the Administrative Law Judge considered the work claimed by *this rule* to be functionally related to traditional work of longshoremen in loading and unloading cargo on and off the ship for ocean transport."[4] Pet. App. 54a (emphasis added). This language, however, simply restates the ALJ's finding in connection with the general work preservation objective of the Rules; it does not address a comparison involving short-stopping. "This rule" refers to ILA Rule 1, which covers work performed by NVOCCs, motor carriers, and others not involved in short-stopping. Pet. App. 224a. The Board made it clear that this overall conclusion did not apply to short-stopping when it subsequently stated that the ALJ

4. The Shipping Group also mistakenly relies on the Board's statements at Pet. App. 53a and 58a-59a, which merely relate to the work of NVOCCs and consolidators, and support the Board's conclusion that the Rules have an overall work preservation purpose.

"concluded that the 50-mile Rule as applied to FSL containers handled by truckers, sought to claim work *traditionally performed by other employees.*" Pet. App. at 55a (emphasis added). It made a similar exception when it stated that the ALJ "also found that some of the short-term and long-term warehousing work claimed under this rule had never been performed by ILA-represented employees at the pier, but rather had traditionally been performed only by employees at inland public warehouses." Pet. App. at 56a. The Board unequivocally stated that "we . . . agree with [the ALJ's] findings and conclusions regarding the application of the general 50-mile rule to consolidators, short-stopping and warehousing." *Id.* at 58a. Thus, the Board recognized that even though the Rules have an overall work preservation objective, short-stopping and certain warehousing work are not related to the longshoremen's traditional functions, and are therefore beyond the lawful reach of the Rules.

If indeed the Board had found, as suggested by the Shipping Group, that short-stopping work is functionally related to traditional ILA work, that finding would automatically have led to a finding that the application of the Rules to short-stopping and speciality warehousing is lawful. No further analysis would have been required, because it would have been clear that work had originated within the longshore unit and had not lost its character as longshore work by changing into a service of a different kind.[5] For example, this same threshold analysis

5. Such a change occurred in *Carrier Air Conditioning Co. v. NLRB*, 547 F.2d 1178 (2d Cir. 1976), *cert. denied*, 431 U.S. 974 (1977) and *Associated General Contractors of California, Inc. v. NLRB*, 514 F.2d 433 (9th Cir. 1975), where products were found to have so changed their character that they lacked a functional relationship to traditional bargaining unit work.

resolved the issue regarding consolidation of LCL containers. The ALJ and the Board concluded that "ILA represented longshoremen had traditionally performed work which was functionally related to this work," which had been "diverted away from the pier by the shipping lines themselves," and "which had previously been performed on the pier by longshoremen." Pet. App. 53a.

Upon finding that the character of short-stopping is unrelated to longshore work the ALJ and the Board identified circumstances they felt more fully explained why the Rules are calculated to satisfy ILA "objectives elsewhere" than at the piers. The ALJ pointed to the fact that short-stopping work "was neither created by containerization nor does it make inroads on that traditionally made available to deepsea ILA labor by marine operators."[6] Pet. App. 135a. The Board disagreed with the ALJ's report only with respect to his reliance on the "surrounding circumstance" that no new motor carrier work was generated by containerization. Apparently fearing that any reliance placed on off-pier work traditions violated the mandate of *ILA I,* the Board sought to explain the lack of a functional relationship between short-stopping and traditional ILA work by pointing to the elimination by containerization of ILA and motor carrier work at the piers.[7] Pet. App. 54a-

6. This same criteria was used by the ALJ to find the work of NVOCCs and consolidators to be functionally related to historic ILA work: "The NVOCCs stuffing and stripping of containers owned or leased by the [steamship lines] is pursuant to a reallocation of work from the piers to off-shore facilities created virtually in its entirety by the development of containerization." Pet. App. 129a.

7. The ILA argues that even where work has been eliminated, "its retention or recapture is perfectly permissible work

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55a. Both of these surrounding circumstances reflect on the true character and origin of the disputed short-stopping work.

In disagreeing with the significance the Board placed on the work elimination circumstance as reflecting on the true objective of the Rules, the Court of Appeals lost sight of the factual findings of the Board, supported by substantial evidence in record, that short-stopping served a different function than had ever been performed by the ILA. Whether or not the enforcement of the Rules "acquires" additional work for longshoremen is not a circumstance the Court of Appeals should have considered in determining functional relationship. Gaining or losing work within the unit may be one of the circumstances reflecting on the purpose of the Rules, but it is not a determinative circumstance and certainly is not relevant to determining functional relationship.[8] It is the purpose for which the

Footnote continued—

preservation activity." ILA Brief at 22, *citing American Boiler Mfrs. Assn. v. NLRB,* 404 F.2d 547 (8th Cir. 1968). In *American Boiler,* however, as in *National Woodwork Mfrs. Assn. v. NLRB,* 386 U.S. 612 (1967), the union sought only to recapture work *in the same form* as it existed before the technological innovation changed the form of the work. Thus, the Shipping Group's reliance on these cases ignores the fact that here the ILA does not seek to *recapture* its old work of handling breakbulk cargo, but rather seeks to *replace* its traditional work with the new container work. The ILA may not lawfully capture the new container work unless it is functionally and historically related to traditional ILA work. The ALJ, affirmed by the Board, found no such relation as regards short-stopping and specialty warehouse container work.

8. That employees in a boycotting unit possess the skills or equipment to perform the disputed work, that the work could be performed within the locus of the unit or even that similar work has in the past been performed in the unit would not make a "work preservation" agreement valid if the disputed work was not functionally related to the unit's traditional work. See *Teamsters Local 282 (D. Fortunato, Inc.),* 197 N.L.R.B. 673 (1972), and other cases cited in ATA Brief at 36-37.

disputed work is performed which reflects upon its function, and not the effect the Rules would have on either the longshoremen's unit or the motor carrier's unit.

III. An Object Of The Rules Is To Prevent Motor Carriers And Warehousemen From Performing Work Historically And Functionally Unrelated To Traditional ILA Work.

A. The "purpose" of the disputed work reflects upon the primary/secondary "object" of the Rules.

To establish that an objective of the Rules is to force the maritime employers "to cease doing business" with motor carriers and warehousemen the "purpose" of the Rules must be examined.[9] The purpose for which the work is performed reflects upon the work's origin and ultimately upon the purpose of the Rules. It is clear from reading the majority and minority opinions in *National Woodwork* that the origin of the disputed work must be considered in determining its relationship to the bargaining unit's traditional work. 386 U.S. at 639, 641, 657. Therefore, the Shipping Group's allegation that "[t]he Trucking Group's 'purpose' test is inherently flawed as an adjudicatory calculus" is without merit. ILA Brief at 30.

The ALJ and the Board,[10] as well as the Trucking Group, have considered the purpose and origin of the disputed work as a part of the inquiry into "all the surrounding circumstances" this Court has required the Board to examine. *ILA I*, 447 at 507; *National Woodwork*, 386 U.S. at 644. The Court also directed the Board to examine "the transformation of several interrelated industries or types of work" and the "relationship between the work as it existed before the innovation and as the agreement proposes to preserve it."[11] *ILA I* at 507. According to the

9. The Court in *ILA I* held that "[a]mong the primary *purposes* protected by the Act is 'the *purpose* of preserving for the contracting employees themselves work traditionally done by them.' *Pipefitters, supra* at 517." *ILA I*, 447 U.S. at 504 (emphasis added).

10. The ALJ and the Board considered the purpose for which work was done by the competing work forces in finding

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Footnote continued—

the Rules lawful with respect to consolidation work and unlawful with respect to short-stopping and certain warehouse work. The concept of "purpose" for which the work was performed was stated in different ways: "for reasons related to" Pet. App. 54a, 133a; "in connection with" *id.* at 56a, 59a, 144a; "associated with" *id.* at 134a; and "for such purposes". *Id.*

11. The *Amicus Curiae* Brief of the AFL-CIO proposes that in determining violations of Section 8(e) "the critical inquiry is on the locus of control over the work in question rather than on the past pattern of work distribution;" and that attention should not be focused "on the fortuity of prior patterns of work distribution rather than on the basic threshold consideration of whether the employees are seeking work from their employer over which the employer has the right to control." AFL-CIO Brief at 21, 5. The AFL-CIO would permit a union to use its economic power to negotiate an agreement requiring the use of an employer's "own employees to do the employer's work—*viz.* work over which the employer has the right to control—even if that work previously was done by others." *Id.* at 12. This proposition goes far beyond the issue pending before the Court, and the record in this case is insufficient to permit an intelligent decision to be made on this argument. Furthermore, the proposed interpretation is inconsistent with every decision of this Court since *National Woodwork*. Permitting a union to claim work never before performed in the bargaining unit, simply because the unit employees have the skills and the desire to perform the work, is the type of predatory conduct Sections 8(b)(4) and 8(e) were designed to prohibit. If the power to control work is the litmus test of an employer's primary status then, for example, any unionized group of employees of a general construction contractor could force the general contractor to assign to them work which would normally be subcontracted and assigned to other tradesmen. There would be chaos in the labor field as competing unions jockeyed for work each claimed its members could and desired to perform.

ALJ, the purpose for which longshoremen or motor carriers and warehousemen perform their work reflects upon the "economic personality" of the industries competing for the work. Pet. App. 111a. He was well aware that "[w]hatever the dimension of this factor, the vital reference point remains whether the objectives are relevant to the primary work unit, or seek to reconcile differences with other employers." Neither the ALJ nor ATA has used "purpose" as a definitive legal test, as alleged by the Shipping Group, but only as a surrounding circumstance to help determine the origin of the work in dispute which ultimately reflects upon the objectives of the Rules.

In *ILA I*, this Court observed that the ILA did *not* try to prevent maritime employers from using container ships at all, "though such an approach would have been consistent with *National Woodwork* and *Pipefitters*." *ILA I*, 447 U.S. at 510. The Shipping Group asserts that "[t]he necessary corollary is that an agreement that longshoremen would stuff and strip all containers at the piers would also have been lawful work preservation." ILA Brief at 30. This "necessary corollary" is in fact a *non sequitur* which flies in the face of *ILA I*. There the Court stated that the instant case "presents a much more difficult problem than either *National Woodwork* or *Pipefitters*" (where the work claimed by the union was the same work it had always done) precisely because the ILA "did not insist on doing the work as it had always been done." *ILA I*, 447 U.S. at 510. Instead of claiming the work of loading and unloading breakbulk cargo from ships, the ILA claims the new work of stuffing and stripping containers.

Continuing its reliance on *non sequiturs*, the Shipping Group argues that if the ILA can stuff and strip all containers, then all stuffing and stripping must be functionally and historically related to traditional longshore work, and if all stuffing and stripping is functionally and historically related to traditional longshore work, then the stuffing and stripping associated with short-stopping and specialty warehouse work must be functionally and historically related to traditional longshore work. ILA Brief at 30. Again, the Shipping Group's argument proceeds on the false premise that this Court sanctioned the stuffing and stripping of all containers in *ILA I*. In reality, this Court recognized that the work claimed by the Rules is different than "the work as it had always been done." *ILA I*, 447 U.S. at 510. Therefore, the Board was directed on remand to compare the "retained work" with "traditional longshore work." *Id.* If this Court's suggestion that the ILA could have prevented maritime employers from using container ships had established a historical and functional relationship between all container work and traditional longshore work, as argued by the Shipping Group, no remand would have been required.

B. Work transfer is not required to establish the secondary objective.

The Shipping Group boldly states the inaccurate proposition that:

> Work acquisition by definition must entail a loss by other employees of the work transferred to the acquiring employees. The Board could not—and, indeed never purported to—make a finding that the functions of warehousing or trucking employees were relocated to the piers.[12] ILA Brief at 19.

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12. No significance can be attached to the Board's failure to make findings of fact as to ILA "acquisition" or "transfer" of work from the motor carriers to the piers or whether ILA container work would "duplicate the off-pier work of truckers

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No authority was cited for this proposition, and we have found none except for the Court of Appeals' decision below.

In requiring that work be transferred from motor carriers to the piers to establish an unlawful work "acquisition" objective the Court of Appeals ignored the principle that work transfer is not required to establish a secondary boycott. See ATA Brief at 37-41. This Court has said in a case where no work was sought to be transferred to the boycotting unit:

> There are circumstances under which the union's conduct is secondary when one of its purposes is to influence the conduct of an employer other than the struck employer. In these situations, *a union's efforts to influence the conduct of the non-struck employer* are not rendered primary simply because it seeks to benefit the employees of the struck employer. *National Woodwork* itself embraced a view that the *union's conduct would be secondary if its tactical object was to influence another employer. NLRB v. Enterprise Assn. of Steam Pipefitters Local No. 638,* 429 U.S. 507, 528 n.16 (1977) (emphasis added).

The General Counsel did not have the burden of proving that motor carriers lost work which was transferred to the longshoremen's unit; it only had to show that an objective of the Rules was to disrupt shipping patterns involving off-pier businesses within the 50-mile zones for the purpose of increasing the prospects that

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Footnote continued—

and warehousemen." ILA Brief at 35. No serious issue ever surfaced as to these matters until the decision by the Court of Appeals. Pet. App. at 28a. If findings regarding "acquisition" or "transfer" are relevant, this case should be remanded for the taking of additional evidence.

some or all of the short-stopped and specialty warehouse container work would be performed on the piers.[13] The record clearly shows that such disruption was the objective of the Rules. Since short-stopping and specialty warehouse work serves land transportation purposes and is not functionally related to traditional ILA work, the proscribed secondary object of the Rules has been shown.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the Decision and Order of the Board should be enforced.

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13. The Shipping Group's argument that "ten years of injunctions" preventing the operation of the Rules permitted the establishment of current shipping patterns, which would otherwise have developed around the piers rather than trucking terminals and warehouses within the 50-mile zone, is without merit and is immaterial. ILA Brief at 25. Implementing the Rules as to short-stopping and warehousing when they were first negotiated would have had the same effect on shipping patterns as when they were implemented in 1984. Shippers would have reacted the same way, by choosing between having the work performed by ILA labor or by someone beyond the 50-mile zones to avoid ILA labor, for the same reasons.

(16)

No. 84-861

In the Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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TABLE OF AUTHORITIES

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1. The Shipping Group respondents[1] ignore the distinctions that are at the heart of this case. This case concerns only the application of the Rules on Containers to two specific practices, shortstopping and certain traditional warehousing activities. Those practices occur in connection only with FSL container loads — containers holding export cargo from only one shipper or import cargo destined for only one consignee. The Board upheld all other applications of the Rules on Containers that were at issue; that is, the Board upheld all applications of the Rules to LCL containers (containers holding export cargo from, or

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[1]We use this term to refer to respondents ILA, the New York Shipping Association, Inc., and the Council of North Atlantic Shipping Associations. We refer to their brief as "Resp. Br."

import cargo destined to, more than one shipper or consignee).

But the Shipping Group presents this case as if it involved the question whether the Rules on Containers taken in their entirety have a lawful work preservation objective. The Shipping Group makes scant mention of the fact that the Board invalidated only the application of the Rules to shortstopping and the warehousing practices; and, tellingly, the Shipping Group makes virtually no mention of the distinction between FSL containers — which can move from shipper to consignee without being stuffed or stripped for any reason functionally related to longshore work — and LCL containers, to which, under aspects of the Board's ruling that are not now in issue, the Rules on Containers can now lawfully be applied.[2]

The Board found that "the work in dispute is the *initial* loading and unloading of cargo into and out of containers within 50 miles of a port" (Pet. App. 57a; emphasis added).[3]

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[2]The Shipping Group relies (*e.g.*, Resp. Br. 17) on the Board's finding that "the work of loading and unloading containers claimed by the Rules is functionally related to the traditional loading and unloading work of the longshoremen" (Pet. App. 58a-59a). But it is evident that the Board (and the ALJ, who made a similar finding (*id.* at 114a)) were referring to their conclusion that the Rules in general have a work preservation objective and did not intend to suggest that every application of the Rules was lawful — as, indeed, their invalidation of the application of the Rules to shortstopping and the traditional warehousing practices demonstrates. See page 7 note 5, *infra*. We note further that the Board made this finding only in connection with the work of freight consolidators, not shortstopping or warehousing.

[3]To define the work in dispute as "the stuffing and stripping of longshore employers' containers at the pier," as the Shipping Group does (Resp. Br. 16-17), is to ignore this Court's admonition in *ILA I* that "the Board's determination that the work of longshoremen has historically been the loading and unloading of ships should be only the beginning of the analysis. The next step is to look at how the contracting parties sought to preserve that work * * * in the face of a massive

The Board further found that the initial loading and unloading *of LCL containers* performed by consolidators and freight forwarders within 50 miles of the port was the functional equivalent of the pre-containerization work of longshoremen of loading and unloading cargo into and out of the hold of the ship; the ILA thus had "a lawful work preservation objective in claiming this work under the Rules" (Pet. App. 59a). However, the Board also found that, insofar as is relevant here, the only initial loading and unloading of *FSL containers* which occurs within 50 miles of a port is that performed by motor carrier employees in shortstopping such containers for the convenience of land transportation and warehouse employees in stripping and stuffing them in connection with specialized warehousing practices. Faithful to the terms of this Court's remand in *ILA I*,[4] the Board focused on whether such work was functionally related to traditional longshore work. After such examination, the Board reasonably concluded that this stripping and stuffing of FSL containers was not related to the traditional work patterns of longshoremen, but rather to that of motor carrier and warehouse employees, and that therefore the Rules, in their application to that work, had an unlawful "work acquisition" objective.[5]

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technological change that largely eliminated the need for cargo handling at intermediate stages of the intermodal transportation of goods, and to evaluate the relationship between traditional longshore work and the work which the Rules attempt to assign to ILA members." 447 U.S. at 509 (footnote omitted).

[4]This Court in *ILA I* directed the Board to conduct "a careful analysis of the traditional work patterns that the parties are allegedly seeking to preserve" (447 U.S. at 507) that focuses on the "historical and functional relationship between the retained work and traditional longshore work" (*id.* at 510).

[5]The Shipping Group's contention (Resp. Br. 18) that the Rules are not " 'applied to shortstopping and traditional warehousing practices' " because the "Rules retain only the work of stuffing and stripping

Thus, as shown in our opening brief (at 6-8, 29-31), before containerization, cargo destined for a single consignee was unloaded in break-bulk from the ship by longshoremen and then placed onto a truck, which was driven a short distance to the carrier's inland terminal near the pier. There — even though the truck load was destined for a single consignee — employees of the motor carrier frequently shortstopped it; that is, they unloaded the cargo and reloaded it for a variety of reasons associated with the economics and safety of motor transportation. After containerization, cargo destined for a single consingee (a FSL container) is taken from the hold of the ship and attached directly to a chassis, thus eliminating the initial break-bulk handling by longshoremen at the pier. From that point on, the FSL container is treated in the same fashion as a truckload destined for a single consignee was treated before containerization. The container is driven to the motor carrier's pier area terminal, where it is shortstopped for the same reasons that precontainerization truckloads were shortstopped. On these facts, the Board was warranted in finding that the work done at the pier by longshoremen in connection with cargo

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containers at the pier" ignores the way in which the Rules operate with respect to FSL containers. Under the Rules, FSL containers are generally permitted to pass through the port area with no claim made by the longshoremen to any loading or unloading work in connection with them. It is only if they are shortstopped by motor carrier employees or stripped or stuffed by warehouse employees within 50 miles of the port that the Rules lay a claim to them, and it is that limited claim alone that is before this Court. (The Rules except FSL import containers where the cargo has been warehoused for at least 30 days; there is currently no similar exception for FSL export containers (Pet. App. 103a-104a).) In short, the conduct that triggers the penalties imposed by the Rules is the performance of stripping and stuffing work by motor carrier and warehouse employees. Accordingly, the Board properly viewed the shortstopping of FSL containers and the stripping and stuffing of such containers in connection with specialized warehousing practices as the work in dispute.

destined for a single consignee has been essentially eliminated due to containerization; and that shortstopping (*of FSL containers*) was not functionally related to traditional longshore work, but rather was related to the traditional work patterns of motor carrier employees.[6] Similarly, as shown in our opening brief (at 8-9, 31-32), the Board was warranted in finding that the stripping and stuffing of FSL containers by specialty warehouses in connection with the storage of goods for later release pursuant to the instructions of the consignee or shipper was not traditional longshore work, but rather was related to the traditional work patterns of warehouse employees, and thus did not warrant requiring a different treatment from that accorded FSL containers that were stripped or stuffed by the consignee or shipper itself.[7]

Nor is the Board's conclusion that the Rules as applied to shortstopping and specialized warehousing practices have an unlawful "work acquisition" objective inconsistent with

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[6]The court of appeals appears to have accepted these findings of the Board (Pet. App. 27a).

[7]Contrary to the Shipping Group (Resp. Br. 26), the Board *did* find that the work claimed by the Rules in respect to shortstopping and stripping and stuffing of FSL containers by specialty warehouses was not functionally related to traditional longshore work: the Board adopted the findings and conclusions of the ALJ (Pet. App. 42a, 57a), who found that shortstopping and specialty warehouse work was not historically and functionally related to traditional longshore work (*id.* at 134a-135a, 138a, 139a, 145a). The Board modified some of the ALJ's rationale, disclaiming any "reliance on the fact that the work now done by the truckers and warehouses is work which was not created by containerization" and relying instead on the fact that the break-bulk handling of the cargo contained in the FSL containers here at issue, previously performed by longshoremen, "essentially was eliminated" (*id.* at 59a). But the Board's holding that the Rules are unlawful as applied to shortstopping and specialty warehouse work is still grounded upon the ALJ's findings that the precontainerization longshore work functions had never included the functions served by shortstopping and specialty warehouse work.

its holding that the Rules as applied to consolidation of LCL containers have a lawful work preservation objective. A work preservation agreement, although valid in its intendment and valid in its application in particular contexts, may violate Sections 8(b)(4)(B) and 8(e) of the Act, 29 U.S.C. 158(b)(4)(B) and 158(e), when applied in other situations. See *NLRB* v. *Enterprise Ass'n of Pipefitters*, 429 U.S. 507, 521 n.8 (1977).

2. The Shipping Group is on no firmer ground in asserting (Resp. Br. 18-21) that the Board could not conclude that the Rules as applied to shortstopping and certain warehousing practices had an unlawful "work acquisition" objective "in the absence of any factual finding that the Rules really do transfer warehousing or trucking work to the piers." For the reasons set forth in our opening brief (at 34-38), this assumption, which was the basis for the court of appeals' rejection of the Board's conclusion (Pet. App. 27a-28a), is erroneous. First, "work acquisition" is merely a shorthand phrase for describing the fact that the work sought to be preserved is not traditional work of the bargaining unit. If the work sought to be preserved is traditional work, the union's action is lawful irrespective of whether it would deprive other employees of work. This is the meaning of the Court's directive in *ILA I* that "the Board must focus on the work of bargaining unit employees, not on the work of other employees" (447 U.S. at 507). On the other hand, if the work sought to be preserved is not traditional work, the union's action is unlawful irrespective of whether it could be duplicated by the employees represented by the union and thus not deprive other employees of work. Second, this Court in *ILA I* specifically contemplated that the Board, in assessing the validity of the Rules, might take into account that "containerization has worked such fundamental changes in the industry that the work formerly done at the

pier by * * * longshoremen * * * has been completely eliminated." 447 U.S. at 510-511. The Court did not intimate that, if the Board found that the longshoremen's work had been eliminated, it must also find that the Rules deprived other employees of work. Third, it is likely that enforcement of the Rules with respect to FSL containers will, in fact, deprive the motor carrier and warehouse employees of work; for the more reasonable assumption is not that the longshoremen will do duplicative work but that the industry will develop practices that avoid an unnecessary break-bulk handling, which, in turn, would deprive motor carrier and warehouse employees of work. See Gov't Br. 36-38.

3. Finally, contrary to the Shipping Group's contention (Resp. Br. 22-24), the Board did not err in ruling that eliminated work cannot be preserved. The Board did not rest its finding that the Rules, as applied to shortstopping of FSL containers and the stripping and stuffing of such containers in connection with specialized warehousing practices, had an unlawful secondary objective solely on the fact that the traditional pierside work of the longshoremen had been eliminated as a result of containerization. It also relied on record evidence which revealed that the stripping and stuffing work claimed by the Rules in these respects was related to the traditional work patterns of motor carrier and warehouse employees, rather than to those of longshoremen.[8]

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[8] Amicus AFL-CIO asks the Court to eliminate the work preservation-work acquisition dichotomy for determining whether an agreement violates Section 8(e) and instead to use as the touchstone " 'whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees' "; where that "touchstone is satisfied the agreement and its maintenance are primary," unless the contracting employer lacks the "right-of-control" over

For these reasons, as well as those set forth in our opening brief, the judgment of the court of appeals, insofar as it denied enforcement of the Board's order, should be reversed.

Respectfully submitted.

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APRIL 1985

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the work in dispute (AFL-CIO Br. 8-9 (citation omitted)). This contention is simply inconsistent with the Court's prior decisions — in particular, with the Court's previous decision in this very controversy, in *ILA I*. In remanding in *ILA I*, the Court stated that, to be lawful under Section 8(e), an agreement "must [first] have as its objective the preservation of work traditionally performed by employees represented by the union." 447 U.S. at 504. In any event, the passage from *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612 (1967), which the AFL-CIO selectively quotes, shows that the inquiry whether the agreement seeks to preserve traditional work is indicative of whether it "is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees," or "tactically calculated to satisfy union objectives elsewhere" (*id.* at 644-645). Accord, *NLRB* v. *Enterprise Ass'n of Pipefitters*, 429 U.S. 507, 517, 519-520 (1977).